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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No.

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, the District of Columbia, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The en banc opinion of the Court of Appeals has not yet been reported and, as modified, is set forth in Appendices A and B *infra,* pp. 1a through 16a. The earlier opinion of a division of the Court of Appeals is reported at 401 A. 2d 955 and is set forth in Appendix C *infra* pp, 17a through

33a. The opinion of the Superior Court of the District of Columbia is set forth in Appendix D *infra,* pp. 34a through 54a.

JURISDICTION

The en banc judgment of the Court of Appeals, as modified, was entered on February 14, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Whether the District of Columbia Self-Government and Governmental Reorganization Act, in which Congress broadly delegated its constitutional power to legislate for the District, empowers the District to repeal the exemption for professional and personal service businesses from the franchise tax imposed by Congress on all other businesses conducted in the District of Columbia.

STATUTES INVOLVED

District of Columbia Self-Government and Governmental Reorganization Act, § 602(a)(5), 87 Stat. 813 (1973), D. C. Code, § 1-147(a)(5) (Supp. V, 1978); District of Columbia Income and Franchise Tax Act of 1947, as amended, Title VIII, § 1, 61 Stat. 345-346, 85 Stat. 582, Title X, § 1, 61 Stat. 349, D. C. Code, 1973, §§ 47-1574 and 47-1580; District of Columbia Revenue Act of 1975, D. C. Law No. 1-23, § 605, 22 D. C. Register 2091, 2113, D. C. Code, § 47-1574 (Supp. V, 1978). These statutes are set forth in Appendix E *infra* at pp. 55a through 57a.

STATEMENT

On December 24, 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (hereinafter "the Self-Government Act"). The stated purpose of the Act

was "* * * to delegate certain legislative powers to the government of the District of Columbia; * * * grant to the inhabitants of the District of Columbia powers of local self-government * * *; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." § 102(a), *id.,* D. C. Code, § 1-121(a) (Supp. V, 1978).

The Act delegated to the District total power to impose any tax, other than one on federal or state property or one on the personal income of a nonresident, which Congress reserved to itself in §§ 602(a)(1) and (5) of the Act. D. C. Code, §§ 1-147(a)(1) and (5) (Supp. V, 1978).

Acting pursuant to the Self-Government Act, the District repealed the exemption for professional and personal service businesses, thus making them subject to a tax that Congress had imposed for almost 30 years on all other incorporated and unincorporated businesses conducted in the District by residents and nonresidents alike. That tax had its genesis in the District of Columbia Income and Franchise Tax Act of 1947, Pub. L. 80-195, 61 Stat. 328 et seq., D. C. Code, 1973, § 47-1551 et seq. (hereinafter "the 1947 Act").

The congressionally stated purpose of the 1947 Act was (1) to impose an *income* tax upon the personal net income of every District resident and (2) to impose a *franchise* tax upon every corporation and upon every unincorporated business, regardless of the residence of its proprietor, for the privilege of conducting any trade or business within the District. Congress defined the measure of the franchise tax as that portion of the net income of the business as is fairly attributable to activities carried on in the District. As a matter of legislative grace, Congress exempted from the franchise tax two limited classes of unincorporated businesses: (1) those "which by law, customs or ethics cannot be incorporated" (professional businesses)

and (2) those "in which more than 80 per centum of the gross income is derived from * * * personal services * * * and in which capital is not a material income-producing factor" (personal service businesses) (61 Stat. 345-346). (Hereinafter both classes of businesses will be called "professional businesses.")

In 1971, Congress enacted the District of Columbia Professional Corporation Act, Pub. L. 92-180, 85 Stat. 576, to permit individuals rendering professional services to incorporate and thus avail themselves of the tax advantages and other benefits stemming from a corporate status. The Act did not, however, disturb the franchise tax exemption for professional businesses, and the exemption continued until later repealed by the District under its expanded self-government powers.

Respondents, a class consisting of nonresident taxpayers affected by repeal of the exemption, challenged the validity of this legislative action, contending that it imposed a tax upon the "personal income" of nonresidents which the Congress had reserved to itself by § 602(a)(5) of the Self-Government Act. Respondents also challenged the tax on other grounds not here pertinent (App. 19a-22a).

Ruling in the District's favor, the Superior Court held that in repealing the exemption the District did not subject nonresident professionals to a congressionally unauthorized personal income tax, but imposed a separate and distinct franchise tax. The court found that the tax was no less a franchise tax simply because it was measured by a portion of net income generated by the affected professional businesses.[1] The court interpreted the phrase in § 602(a)(5), " 'tax on the whole or any portion of the personal income' * * * to mean a personal income tax as that term is commonly used" and found such an interpretation to be consistent with the legislative history of the Self-Government Act. (App. 51a).

[1] In determining the measure of the unincorporated business franchise tax, a professional business is allowed to deduct all ordinary and necessary expenses from gross income. In addition, the business is granted *a salary allowance for its proprietor(s) of up to 70% of net income,* together with a $2500 exemption. The remaining amount, upon which the tax is imposed, is treated as income to the business (App. 10a).

Respondents appealed, and a division of the District of Columbia Court of Appeals reversed the Superior Court's judgment (App. 33a). Subsequently, upon the District's petition for rehearing en banc, the Court of Appeals, with Judge Mack dissenting, reinstated the opinion of the division, as modified, as the en banc opinion of the Court. (App. 1a-16a) This petition for a writ of certiorari, invoking the Court's jurisdiction under 28 U. S. C. § 1257 (3), followed.[2]

[2] Since the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, this Court has addressed its jurisdiction to review decisions of the District of Columbia Court of Appeals under 28 U. S. C. § 1257(1) and (2), but has not yet addressed its jurisdiction under § 1257(3). See *Palmore* v. *United States,* 411 U. S. 389 (1973); *Key* v. *Doyle,* 434 U. S. 59 (1977). This Court has previously held that when Congress legislates for the District of Columbia, the laws which it enacts are laws of the United States. *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264 (1821); *O'Donoghue* v. *United States,* 289 U. S. 516, 539-540 (1933). In view of the unique status of the District of Columbia and the plenary power of Congress to fashion a home rule system of government for the District, jurisdiction exists in this case because the Self-Government Act is a statute or law of the United States within the purview of § 1257(3).

The Self-Government Act, in contrast to the more limited congressional enactments involved in *Palmore* and *Key,* is the organic act in which Congress reserves and delegates its constitutional power to legislate for the District of Columbia. In declaring District legislation repealing the exemption for professional businesses repugnant to the Self-Government Act, the Court of Appeals has in effect declared a state statute repugnant to a law of the United States within the meaning of § 1257(3). In addition, the Court of Appeals has deprived the District of a "right" claimed under a statute of the United States, if not a right exercised under the "authority" of the United States, within the meaning of § 1257(3). In that connection, the District is claiming that the Self-Government Act grants it both the "right" and the "authority" to impose taxes on professionals who conduct their businesses within its borders, whether or not they are District residents. Each of these theories plainly justifies the exercise of this Court's certiorari jurisdiction under 28 U. S. C. § 1257(3).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals rewrites the Self-Government Act in a way that seriously curtails the grant of self-government and deprives the District of its ability to raise essential revenues.[3] By expanding a narrow restriction on this grant of self-government far beyond its intended scope, the Court returns to Congress legislative powers which it had plainly delegated to the District. The Court's decision obliterates carefully conceived taxing concepts established by Congress for the District over 30 years ago and generates a serious dilemma by leaving the District with an unequal and discriminatory taxing scheme. Nor is the impact of the decision limited to the shores of the Potomac, for it affects attorneys, accountants, and other professionals throughout the nation who are subject to taxation for the privilege of operating a business in the District of Columbia.

This Court has not hesitated to exercise its certiorari jurisdiction in cases involving the administration and interpretation of District of Columbia statutes of major importance. See, e.g., *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953); *Shuttle Corp.* v. *Transit Comm'n*, 393 U. S. 186 (1968); *District of Columbia* v. *Murphy*, 314 U. S. 441, 452 (1941); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944); R. Stern and E. Gressman, *Supreme Court Practice*, 310 (4th ed., 1978). Measured by these standards, there is ample justification for this Court's review.

[3] As a direct result of the Court's decision, the District would lose more than $40 million in tax collections, which it must refund, together with interest, in fiscal 1980 to respondents. The decision also places a cloud over the District's authority to impose in the years ahead any tax, measured by net income, on this class of taxpayers under the Self-Government Act. The existence of "a question important to revenue" has been held by this Court a factor to be considered in determining whether this Court should exercise its jurisdiction. See *Commissioner* v. *Standard Life & Acc. Ins. Co.*, 433 U. S. 148, 151, and n. 5 (1977). When the other factors in the instant case are considered in combination with the revenue loss to the District, the exercise of this Court's certiorari jurisdiction is fully justified.

I

This case turns on the scope of the organic Self-Government Act, whereby Congress broadly delegated its power to legislate for the District under article I, section 8, clause 17 of the United States Constitution, while expressly reserving certain enumerated powers necessary for the protection of the federal interest in the Nation's Capital. Cf. *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 109 (1953). In order to achieve the purpose of the Act, to grant self-government to the District and relieve Congress of this legislative burden "to the greatest extent consistent with the constitutional mandate" (§ 102), Congress delegated the District authority over "all rightful subjects of legislation." § 302, D. C. Code, § 1-124 (Supp. V, 1978).

The decision of the Court of Appeals results in a serious depreviation of self-government and a reimposition on Congress of legislative functions that Congress delegated to the District. Although Congress imposed certain limitations on this broad grant of power in Title VI of the Act (Reservation of Congressional Authority), Congress did not intend that these limitations be invoked to return to it the burden of legislating on matters logically within the grant of self-government, at least to the extent that such legislation does nothing more than apply concepts adopted by Congress itself in antecedent enactments.

The particular legislative power involved in this case is the most crucial power of any government—the power to tax and raise revenues necessary to its exsitence.[4] Sub-

[4] The unincorporated business franchise tax on professionals is particularly vital to the District of Columbia given the unique nature of the Nation's Capital which does not permit heavy industry or other like revenue-generating activities. Professional and personal service activities are among the top revenue growth areas in the District of Columbia. Given the tax exempt status of over 50% of the real property in the District of Columbia, and the prohibition on extending the District's personal income tax laws to non-residents, which allows over 60% of the income of persons employed in the District to escape local taxation, the tax base of the District is extremely narrow. See *District of Columbia Government, The Federal Payment FY 1981*, 9-10 (1979).

ject to the limitations previously noted, the District has statelike powers to impose taxes. *District of Columbia* v. *Thompson Co., supra.* In *Alaska* v. *Arctic Maid,* 366 U. S. 199, 202 (1961), in which the appellate court invalidated an Alaska tax, this Court granted certiorari "because of the importance of the ruling to the new State of Alaska." Likewise, in *Territory of Alaska* v. *American Can Co.,* 358 U. S. 224, 225 (1959), which involved a State tax, this Court granted certiorari "in view of the fiscal importance of the question to Alaska." The ruling of the Court of Appeals invalidating a tax on the ground that it is beyond the District's newly conferred powers of self-government is no less important to the District's ability to govern itself and establish a sound revenue base essential to its economic health.

This revision of the Self-Government Act's allocation of powers between the District Government and Congress creates a gaping hole in the District's franchise tax structure and generates an inequitable distribution of the tax burden. As matters now stand, a preferred, exempt status is granted to nonresident attorneys and other professionals who practice in the District while all other businesses must pay the franchise tax no matter where the proprietors reside. But, since these professionals are manifestly engaged in the pursuit of local businesses and may now incorporate with the advent of the Professional Corporation Act of 1971, there appears no just reason for construing the Self-Government Act as mandating the continuance of their exempt status; to do so would contravene the basic purpose of the Act. This is particularly so in an era in which the distinction between professional businesses and other businesses "has become an anachronism." See *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 371-372 (1977).

In addition to presenting issues of fundamental importance to the people of the District, this case has a significant effect on residents of many States across the nation

who practice their professions in the District of Columbia. See *District of Columbia* v. *Murphy, supra.* Respondents are a class consisting of residents of these States who are affiliated with legal, accounting, and other professional firms with offices in the District.

The interjurisdictional importance of this case is also clear from pertinent decisions of the courts in other jurisdictions. As the Court of Appeals noted (App. 25a-27a), the highest court of Maryland has held that the District's unincorporated business franchise tax is not a personal income tax for purposes of allowing a Maryland taxpayer a credit on his income tax return. See *Gardella* v. *Comptroller,* 231 Md. 1, 130 A. 2d 752 (1957). On the other hand, a lower Virginia court reached an opposite result. See *Groom* v. *Forst,* Circuit Court, Arlington County, At Law No. 18809 (filed March 30, 1978) (appeal pending). But see *Commonwealth* v. *Werth,* 116 Va. 604, 82 S. E. 695 (1914).

Therefore, this case has consequences extending far beyond the District's borders, illustrative of "the unusual character of the National Capital" in a context which is "extremely important to the administration of the District's tax laws." See *District of Columbia* v. *Murphy, supra,* 314 U. S. at 452; *District of Columbia* v. *Pace, supra,* 320 U. S. at 700. Review by this Court is most appropriate in view of the immense impact of the Court of Appeals' decision on the governmental rights of the District's citizens and the District's fiscal stability.

II

In invalidiating the tax in question, the Court not only violated the spirit and stated purpose of the Self-Government Act, but also contravened its plain meaning and violated settled principles of statutory construction long recognized by this Court.

In holding that the District lacked the power to repeal the exemption for professional businesses from the franchise tax, the Court ignored critical words in § 602(a)(5) and the relevant taxing scheme for construing those words. Section 602(a)(5) of the Self-Government Act, D. C. Code, § 1-147(a)(5) (Supp. V, 1978), provides that the District may not:

> * * * impose a tax on the whole or any portion of the *personal income,* either directly or at the source thereof, of any *individual* not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of the *District of Columbia Income and Franchise Tax Act of 1947)* * * *. [Emphasis added.]

However, this restriction merely precludes the District from imposing a tax on the personal income of individuals who are not residents of the District. It plainly does not prevent the District from imposing a *franchise tax* on unincorporated *business entities* for the privilege of doing business in the District.

The explicit reference in § 602(a)(5) of the Self-Government Act to the "District of Columbia Income and Franchise Tax Act of 1947" makes clear that the conceptual distinctions between personal income and franchise taxes set forth in the 1947 Act were intended by Congress to remain controlling in construing that provision. See *Posadas* v. *National City Bank,* 296 U. S. 497, 505 (1936). Yet the Court, unlike the dissenting judge (App. 8a-12a), completely ignored the significance of this directly related and longstanding taxing scheme specifically incorporated in § 602(a)(5). Instead of utilizing that antecedent enactment and interpretive decisions as an aid to construction of § 602(a)(5), the Court relied on decisions of federal and state appellate tribunals construing completely different taxing schemes designed for different purposes. (App. 27a-29a).

In the District's taxing scheme created by the 1947 Act, Congress conceived the tax in question, not as a tax on personal income, but as a privilege or franchise tax designed to reach the business income of residents and nonresidents who conducted businesses or trades in the District of Columbia. And, in the same enactment, Congress specifically distinguished the franchise tax from the tax it imposed on the personal income of residents. 61 Stat. 349, D. C. Code, 1973, § 47-1580. See also H. R. Rep. No. 543, 80th Cong., 1st Sess. 2-4 (1947); S. Rep. No. 289, 80th Cong., 1st Sess. 2-4 (1947). That distinction has been repeatedly reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in interpreting the 1947 Act. See *District of Columbia* v. *Pickford,* 86 U. S. App. D.C. 17, 18-19, 179 F. 2d 271, 272-273 (1949). See also *District of Columbia* v. *Brady,* 109 U. S. App. D. C. 324, 330, 288 F. 2d 108, 114 (1960); *Smoot Sand and Gravel Corp.* v. *District of Columbia,* 104 U. S. App. D. C. 292, 261 F. 2d 758 (1958).[5]

In repealing the exemption for professional businesses, the District did not alter the nature of the franchise tax approved by Congress in 1947. On the contrary, consistent with both the concepts and distinctions embodied in the longstanding antecedent taxing scheme and the stated purpose of the Self-Government Act to relieve Congress of the burden of local legislation, the District filled a gap in the local franchise tax structure, from which professionals had been exempted purely as a matter of legislative grace. That the District's action did not exceed the limitations imposed by § 602(a)(5) of the Self-Government Act is further supported by the congressional decision not to disapprove the action following hearings on its validity

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[5] And as the dissenting judge noted (App. 11a-12a), the conceptual distinction between an income tax and a franchise tax also finds clear support in the decisions of this Court. See *Pacific Co. Ltd.* v. *Jonhson,* 285 U. S. 480 (1932); *Educational Films Corp.* v. *Ward,* 282 U. S. 379 (1937); *Home Insurance Co.* v. *New York,* 134 U. S. 594 (1890).

pursuant to the unique review mechanism established in the Self-Government Act. *Id.*, § 602(c), D. C. Code § 1-147(c) (Supp. V, 1978). See Hearings and Disposition before the Subcommittee on Fiscal Affairs of the Committee on the District of Columbia of the House of Representatives on H. Con. Res. 370 to Disapprove the D. C. Revenue Act of 1975, 94th Cong., 1st Sess., Serial No. 94-5 (1975).

Viewed in this light, the construction given the general language of § 602(a)(5) by the Court of Appeals reverses over 30 years of congressionally established taxing distinctions in clear contravention of principles of statutory interpretation enunciated by this Court. This Court has repeatedly stressed that it will not infer from general statutory phraseology that Congress intends to alter longstanding and established legislative concepts unless Congress expresses its decision to do so in unmistakable terms. See *Ozawa* v. *United States,* 260 U. S. 178, 193-194 (1922); *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542-544 (1940); *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 145 (1976).

The Court of Appeals, in its examination of the legislative history (App. 3a-4a), sets forth no congressional pronouncement which spells out an intent to reconstitute the the franchise tax as a tax on personal income with respect to nonresidents who conduct professional businesses in the District. Yet, this Court has observed that, "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." See *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 260 (1945); compare *General Electric Co.* v *Gilbert, supra,* 429 U. S. at 145.

But, in this case, there were words which were commonly understood, as the trial court noted, as well as extensive

legislative history. As noted by the dissenting appellate judge (App. 13a), the legislative history demonstrates that the prohibition contained in § 602(a)(5) of the Self-Government Act was aimed at the "commuter" and "reciprocal" income tax proposals made by the District prior to enactment of the Self-Government Act. These proposed taxes were distinct and separate from the business and franchise taxes challenged here. Congress rejected these proposals in 1969 and 1971; and in 1973 it included § 602(a)(5) in the Self-Government Act to prevent the newly-created District Government, with greatly expanded legislative powers, from enacting such income taxes on the wages and personal income of nonresidents employed in the District.[6]

The legislative history of the Self-Government Act also makes plain that Congress did not intend to place constraints on the District's power to revise or extend the franchise tax structure. The distinction between an across-the-board tax on the personal income of nonresidents and the business franchise taxation involved here, was clearly articulated by Senator Eagleton, the principal Senate sponsor of the Self-Government Act and Chairman of the Senate District Committee. See 117 Cong. Rec. 35747 (1971).

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[6] See Revenue Proposals: Hearings before the House Committee on the District of Columbia, 91st Cong., 1st Sess. 12-13 (1969); D. C. Revenue Proposals: Hearings before the Subcommittee on Fiscal Affairs of the Senate District of Columbia Committee on H. R. 12982, 91st Cong., 1st Sess. 171-172 (1969); District of Columbia Appropriations for 1972: Hearings before the House Subcommittee on Appropriations, 92nd Cong., 1st Sess., Part 1, 90 (1971); D. C. Appropriations: Hearings before the Senate Committee on Appropriations, 92nd Cong., 1st Sess., Part I, 18 (1971); D. C. Revenue Act of 1971: Hearings before the Senate District of Columbia Committee on H. R. 11341, 92d Cong., 1st Sess. 195 (1971); 119 Cong. Rec. 33653, 42452 (1973). See also the debates on the 1947 Act for further evidence of the problem with which Congress has been concerned for years and which Congress reserved strictly to itself under the Self-Government Act: viz. placing income taxes on the salaries and wages of the thousands of Federal Government and congressional employees who work in the District but do not reside there. See 93 Cong. Rec. 6633-6655 (1947).

The decision of the Court of Appeals presents a glaring inconsistency. For, if, contrary to what Congress spelled out in the 1947 Act, a tax aimed at the business income of locally practicing professionals is now to become a tax on "personal income," the same may logically be said of *any* tax measured by net income. Carried to its logical conclusion, the Court's decision amounts to a recharacterization of the District's franchise tax, at variance with settled rules of construction as they relate to longstanding congressionally approved taxation concepts. Indeed, given the approach of the Court of Appeals in construing § 602 (a)(5) of the Self-Government Act, without due reference to the 1947 Act, it is difficult to conceive how the District may impose any kind of franchise tax on businesses conducted by nonresident proprietors within its borders (cf. App. 5a with App. 29a, 33a), except by shifting the burden of local enactment back to Congress. Yet, as the dissenting judge cogently observes (App. 12a), this class of businesses, like all other businesses (whose nonresident owners are incontrovertibly amenable to the franchise tax involved here), has

> * * * the privilege of deriving income from sources within the District, while enjoying the use of District facilities and reaping the benefits of protective and environmental services. Certainly the minimum return in the way of a franchise exaction is not too much to ask. * * *

These factors, viewed in light of the inequitable taxation structure that results from the Court's interpretation of the Self-Government Act, and the devastating impact that the Court's decision has on the exercise of the revenue raising power so vital to the District Government under home rule, and the unsupportable redefinition of the powers reserved by Congress itself under the Self-Government Act, surely present a question of sufficient substance and importance to warrant review by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12871

RICHARD A. BISHOP, APPELLANT,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 12872

DISTRICT OF COLUMBIA, APPELLANT,

v.

RICHARD A. BISHOP, APPELLEE.

No. 12920

AXEL-FELIX H. KLEIBOEMER, APPELLANT,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 12921

DISTRICT OF COLUMBIA, APPELLANT,

v.

AXEL-FELIX H. KLEIBOEMER, APPELLEE.

On Petition for Rehearing En Banc

(Argued en banc October 15, 1979
Decided February 12, 1980)

John M. Bixler, with whom *Ronald D. Aucutt* was on the brief, for Richard A. Bishop.

[285-A]

Philip L. Kellogg, with whom *James L. Lyons* and *Bradley G. McDonald* were on the brief, for Axel-Felix H. Kleiboemer.

Judith W. Rogers, Corporation Counsel, with whom *Richard W. Barton*, Deputy Corporation Counsel, *Robert E. McCally*, *David P. Sutton*, *Richard L. Aguglia* and *James C. McKay*, Assistant Corporation Counsel, were on the brief, for the District of Columbia.

Before NEWMAN, *Chief Judge*, and KELLY, KERN, GALLAGHER, NEBEKER, HARRIS, MACK, FERREN and PRYOR, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

Opinion for the court by *Associate Judge* KELLY.

Dissenting opinion by *Associate Judge* MACK at p. 6.

KELLY, *Associate Judge*: The arguments advanced by the government in the en banc rehearing of this case do not persuade this court to disturb the division's holding in *Bishop v. District of Columbia*, D.C.App., 401 A.2d 955 (1979), that Section 605 of the Revenue Act of 1975 [1] was an impermissible exercise of the District of Columbia Council's authority under § 602(a)(5) of the Home Rule Act.[2]

Section 605 of the Revenue Act of 1975 repealed the professional exemption to D.C. Code 1973, § 47-1574 (the unincorporated business tax provision) and thereby im-

[1] The Revenue Act was enacted on October 21, 1975, as D.C. Law No. 1-23.

[2] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. Code 1978 Supp., §§ 1-121 to -171).

posed a tax on nonresident unincorporated professionals and personal service businesses. The division concluded that this repeal circumvented the intention of Congress, as stated in the Home Rule Act, that: "The Council shall have no authority . . . to (5) impose any tax on the whole or any portion of the personal income . . . of any individual not a resident of the District . . . ." D.C. Code 1978 Supp., § 1-147(a)(5). The division thus held that the resulting tax on unincorporated professionals was not a franchise or gross receipts tax but, rather, a tax levied upon the personal income of "individuals who are professionals and are not protected by the corporate veil . . . ." *Supra* at 961.

We here underscore the division opinion's holding with several instructive comments from the legislative history of the Home Rule Act that were drawn to our attention on rehearing en banc; we also emphasize the limits of that holding.

During the Senate hearings on the Home Rule Act, in response to the query whether "the [Senate] Committee [on the District of Columbia] has eliminated anything in regard to a commuter tax," the Committee Chairman, Senator Thomas Eagleton, responded, "Yes. There is a *specific prohibition* as to the imposition *of a commuter tax, a reciprocal income tax, or any other tax on nonresidents* of the District of Columbia." 117 CONG. REC. 42498 (1971) (emphasis added).

Senator Charles Mathias elucidated the rationale for enacting the prohibition found in § 602(a)(5) of the Act: "The increased Federal payment [to the District] also compensates for the Congress' refusal to permit the District to levy taxes on the income of nonresidents." *Id.* at 42502.

Senator Eagleton clearly distinguished the permissible franchise tax from the impermissible commuter tax in the October 12, 1971, debates on S. 2652:

> For example . . . of utmost significance . . . the present mayor-commissioner and council have jurisdiction over taxes—to wit, the real property tax. They can raise it or lower it. As to all other taxes, including franchise taxes, sales taxes, local taxes, that jurisdiction is in Congress. We transfer the jurisdiction of taxation to the elected city council and to the elected mayor—*holding back*, as I said before, *the commuter tax*. [117 CONG. REC., *supra* at 35747; (emphasis added).]

The remarks of Representative Breckenridge of Kentucky, are particularly revealing on the question of congressional intent: "I am concerned about the phrase, 'personal income tax.' I take it what we are driving at here is precluding any tax which is based on a percentage of income regardless of whether it is technically considered personal income . . . ." Congressman Gude of Maryland (the House of Representatives proponent of the amendment enacted as § 602(a)(5)) answered: "The thrust of this amendment, the interpretation would be that that would be included under this amendment. That was the intent when the amendment was offered in the Senate." Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills Culminating in The District of Columbia Self-Government and Governmental Reorganization Act, ch. II (Dec. 31, 1974) 1126. H.R. REP. No. 83-92, 92d Cong., 1st Sess. (1971).

The government cites *Palmore v. United States*, 411 U.S. 389, 395 (1973) for the proposition that we must presume Congress "legislated with care" when it enacted

§ 602(a), arguing that "had [Congress] intended to prohibit the Home Rule Government from taking the action in question, it would have said so expressly, and not left the matter to mere implication." District of Columbia Petition for Rehearing En Banc at 7. We agree, and reiterate our conclusion that Congress expressly and specifically withheld the District of Columbia Council's authority to impose a tax on the income of nonresidents. By enacting § 605 of the Revenue Act of 1975, which repealed the professional exemption contained in § 47-1574, the Council circumvented this express congressional prohibition. Section 605 is therefore invalid.

The government also contends that the division opinion "places other existing and proposed taxing measures of the District Government under a cloud." District of Columbia Petition for Rehearing En Banc at 2. This contention betrays a misunderstanding of our judicial role. We did not, and as a nonlegislative body could not, intend to instruct the District of Columbia Council as to the relative propriety of alternative schemes for raising tax revenues. We are limited to deciding the case before us. The division's discussion of a gross receipts tax, *Bishop v. District of Columbia*, *supra* at 966 *et seq.*, was employed as an illustrative device, to contrast the features of a gross receipts tax with those of a net income tax. This discussion, therefore, should not be read to either prescribe or proscribe the District of Columbia Council's adoption or continued imposition of a gross receipts tax, or of any taxing measure other than the one before the division at that time.

The division opinion, vacated June 11, 1979, is hereby reinstated as the en banc opinion of the court.

So ordered.

MACK, *Associate Judge*, dissenting: I agree with the majority that the District of Columbia cannot levy a tax upon the personal income of nonresidents. The majority apparently agrees with me that the District of Columbia *can* levy a tax upon nonresident professionals who operate an unincorporated business in the city. Having agreed to this extent, we disagree. In my opinion the majority's rationale evidences a common, and understandable, failing of those of us whose lives have been shaped in this federal city; in its preoccupation with what the City Council cannot do, it has lost sight of what the Council did, and what Congress, which has not been reluctant to say what the Council can or cannot do, has chosen not to countermand.

The prohibition of § 602(a)(5) of the Home Rule Act [1] is clear enough; Congress proscribed the imposition of "any tax on the whole or any portion of the personal income, either directly or at the source . . . of any individual not a resident of the District." D.C. Code 1978 Supp., § 1-147(a)(5). But this provision, and its legislative history, relied upon by both sides in this litigation, address but one aspect of the total picture. We must look to the challenged action of the Council—here the amendment to Title VIII of the 1947 Revenue Act, a provision specifically addressed to "Tax on Unincorporated Businesses." Pub. L. No. 80-195, 61 Stat. 345 (codified at D.C. Code 1973, § 47-1574). As the division opinion adopted by the majority en banc points out (*Bishop v. District of Columbia*, D.C.App., 401 A.2d 955, 957 (1979)), the purpose of this title was to " 'impose a tax upon all business income which would be subject to the

[1] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. Code 1978 Supp., §§ 1-121 to 1-171).

corporation franchise tax if incorporated, regardless of whether the business is carried on by an individual, by a partnership, or by some other unincorporated entity.' " *Id.* at 957, *quoting* 16 DCRR § 307 p. 122.

What the City Council did in enacting § 605 of the Revenue Act of 1975,[2] was to delete the last sentence from this business tax provision which had heretofore exempted certain professional and personal services entities from its coverage.[3] The issue here cannot be as-

[2] D.C. Law No. 1-23, § 605 (codified at D.C. Code 1973, § 47-1547).

[3] The tax provision read as follows:

Title VIII.—Tax on Unincorporated Businesses

§ 47-1574. Definition of unincorporated business.

For the purposes of this subchapter (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" means any trade or business, conducted or engaged in by an individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under sections 47-1571 and 47-1571a. *The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under chapter 11 of title 29, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.* [Emphasis supplied to identify deletion.]

sessed without resort to a closer look at the scheme of the taxing statute in question, which for close to thirty years has been applied to residents and nonresidents alike.

1. The provisions of Title VIII of the 1947 Act are explored in an early decision of this jurisdiction, *District of Columbia v. Pickford*, 86 U.S.App.D.C. 17, 179 F.2d 271 (1949). The rationale of that decision is instructive both as to the purpose of our unincorporated business tax and its character as a franchise tax *despite its levy on net income*. In holding that a nonresident owner of a hotel, who leased the hotel to another, was not engaged in an unincorporated business, the court said:

> Title VIII of the statute levies the tax for the privileges both of carrying on business and of receiving income from sources within the District. But the levy is upon the net income of an unincorporated business only. The privilege of receiving income from sources within the District, for which the statute imposes the tax, is, under this statute, a privilege being exercised by an unincorporated business. So, if there be no "business" within the meaning of the statute, there is no tax. [*Id.* at 18, 179 F.2d at 272.]

The court made crystal clear the difference that the statute makes between a tax levied on business income and a tax levied on the personal income of an individual, noting:

> It is striking that this act does not levy a tax upon nonresident individuals generally upon income from sources within the District, as the federal income tax law and the laws of many states do in respect to nonresidents of their respective jurisdictions. While Title VI [taxing

> income] is headed "Tax on Residents and Nonresidents", the tax levied by it is upon residents only, as that term is defined in the act. [*Id.*]

With respect to the general scheme of our statute in relation to nonresidents, the court added:

> The scheme of the statute seems to be that nonresidents be taxed only upon income of a "business", and that tax is to be effected by a franchise exaction. If this were not the scheme of the statute, we see no reason for the elaborate and precisely worded provisions to that effect and the omission of any general levy upon nonresidents. There is a broad definition of resident, but, outside the borders of that definition, nonresidents seem to be untaxed except by way of the franchise upon "unincorporated business". [*Id.* at 19, 179 F.2d at 273.]

If we accept the precedential impact of the *Pickford* decision (which it seems to me that the Division, at least, was required to do)[4] three conclusions necessarily follow: 1) the tax to which appellants have been subjected by the Council's action is a franchise tax for the privilege of doing business in the District of Columbia, 2) it is properly imposed upon nonresidents, and 3) the fact that it is imposed upon net income does not make it a personal income tax. The issue then becomes, not one of whether the Home Rule Act prohibits the taxing of the personal income of nonresidents, but whether a nonresident engaging in professional practice in the District may be an unincorporated business for the purpose of the franchise tax. I suggest that there is no reason in law or logic for concluding that a professional doing busi-

[4] *M.A.P. v. Ryan*, D.C.App., 285 A.2d 310 (1971).

ness in the District is not a business entity subject to a franchise tax. It seems clear enough from the broadly worded definition of unincorporated business in § 47-1574, as well as the efforts of the Bar itself to maintain the exemption for professionals, that the exemption was granted by Congress purely as a matter of legislative grace. Moreover, in view of this court's careful disavowal of any intent to imply that the District of Columbia cannot impose an unincorporated business tax on nonresident professionals, that would seem to be the end of the matter.

2. If, however, the en banc majority is inclined to ignore the teaching of *Pickford* that § 47-1574 properly exacts a franchise from nonresidents based upon business net income, I suggest it is in no better position. I, like the majority, look to the method and effects of the tax computation; I do not find the incidents of a personal income tax.[5] Under the scheme, after normal business deductions are subtracted from gross business earnings, a salary allowance equal to 70% of the net income computed without this deduction, plus a $2,500 exemption, are permitted prior to imposition of the tax for calendar year 1975. (D.C. Code 1973, § 47-1557b(a)(15) and D.C. Code 1978 Supp., § 47-1574c.) [It is this salary allowance (or share thereof) plus the share of the exemption that a District of Columbia resident reports on his personal income tax return.] Under the tax scheme of § 47-1574, earnings or deductions that are not business related

[5] As a result of the prior exemption of professionals from the obligation of paying a tax for the privilege of doing business in the District of Columbia, I fear that some have grown accustomed to treating the whole of the business net income as their personal income. The franchise tax must be viewed as another business expense which must be deducted from business income.

are not computed as part of the gross income or allowable expenses. The 70% salary allowance recognizes the legislative deletion of personal income in a reasonable amount from the imposition of the tax, leaving 30% of net residual business income less $2,500 as the measure of the taxable business income. Payment of the tax is a joint and/or several liability of the owners or managers. D.C. Code 1973, § 47-1574d. For example, one partner could be held liable for the entire business franchise tax, although that payment has no relation to his personal earnings. *Id.* Unlike a personal income tax, there is a minimum tax liability of $25. *Id.* § 47-1574b.

The majority's focus on the distinction between gross receipts and net income says very little in light of the purpose and scheme of § 47-1574. The object of the statute is not to tax the consumable wealth of nonresidents but to levy a tax for the privilege of doing business here. *See District of Columbia v. Pickford, supra.* In imposing such a tax, a legislature may employ either a net income approach or a gross receipts approach as a matter of administrative convenience.[6] Repeated holdings of the Supreme Court recognize that there is a distinction between an income tax and a franchise tax imposed on the privilege of doing business, even though the latter tax is measured with reference to net income. *See, e.g., Pacific*

[6] The New Jersey legislature, in imposing an unincorporated business tax, noted:

> The Committee considered using a net income approach rather than gross receipts but concluded that such an approach would be entirely too cumbersome considering the low rates and yields involved. At the levels suggested, it did not appear that a gross receipts approach would be unduly burdensome. [*Foosaner v. Director, Division of Taxation*, 58 N.J. 57, ——, 275 A.2d 129, 131 (1971).]

Co., Ltd. v. Johnson, 285 U.S. 480 (1932); *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931); *Home Insurance Co. v. New York*, 134 U.S. 594 (1890).

Moreover, the rationale of the majority reasoning appears to be clouded by preoccupation with notions of franchise taxation as applied to corporations. Thus, it is said "[t]o the extent that we deal with individuals who are professionals and are not protected by the corporate veil, we must find that the tax burdens the taxpayer personally." *Bishop v. District of Columbia, supra* at 961. Following this reasoning, it does not appear to me exactly why a nonprofessional engaged in an unincorporated business, and likewise not protected by a corporate veil, would not be equally burdened. And therein, it seems to me lies the danger of the majority's holding; it makes the District of Columbia franchise statute vulnerable to attack by others on constitutional grounds.[7] It gives preferential treatment to nonresident professionals. Yet both professional and nonprofessional residents and nonresidents alike enjoy the privilege of incorporating a business. *See* District of Columbia Professional Corporation Act, Pub. L. No. 92-180, 85 Stat. 576 (codified at D.C. Code 1973, § 29-1101 *et seq.*). Similarly, all have the privilege of deriving income from sources within the District, while enjoying the use of District facilities and reaping the benefits of protective and environmental services. Certainly the minimum return in the way of a franchise exaction is not too much to ask. As the New

[7] I find it somewhat disingenuous for the taxpayers here to argue that nonresidents are denied equal protection by the Council's action because residents may receive tax credit when filing District of Columbia personal income tax returns. Obviously the District of Columbia has no control over what tax credits neighboring jurisdictions extend to their residents.

Jersey Supreme Court has noted, in quoting from a legislative report with respect to an unincorporated business statute, and in holding that lawyers were subject to the tax:[8]

> This tax does not represent a major revenue source under the Committee's proposal. It could be eliminated easily through an adjustment of the rates from the other three tax sources. The Committee concluded, however, that such a tax was desirable because it would retain within the tax umbrella certain elements of the business community which would otherwise escape all or most business taxes. *This is particularly true of professional and service areas.* [*Foosaner v. Director, Division of Taxation*, 58 N.J. 57, ——, 275 A.2d 129, 131 (1971) (emphasis in original).]

3. Underlying all of this discussion is the indisputable fact that the Home Rule Act does not prohibit the Council from legislating with respect to a franchise tax. The reference to a "commuter" tax only triggers an emotional response and obscures the issue. The Corporation Counsel, in its supplemental brief on rehearing en banc, has meticulously set forth the specific proposals introduced in at least four sessions of Congress (90th, 91st, 92nd, 93rd) which, in dealing with such measures as reciprocal income tax provisions, constitute the true reasons for commuter tax concerns at the time of the passage of Home Rule. In my view, these concerns have nothing to do with the privilege of conducting a business in the District of Columbia, as the reasoning of *Pickford* makes

[8] *See also Shapiro v. New York*, 32 N.Y.2d 96, 296 N.E.2d 230, 343 N.Y.S.2d 323 (1973), holding that professionals are properly subjected to a business income tax.

clear. I submit there is an appreciable difference between taxing the personal income of a federal (or district) employee or official, who comes from a neighboring jurisdiction into the city to work in a defined enclave at a fixed salary paid by the government, and the levying of a tax on a business owned and operated by a nonresident who derives a source of income from within the city itself.

4. Followed to its logical conclusion, what the court does today is to strike down the validity of the Council's action only as to nonresident professionals, since it is not questioned that resident professionals can be taxed even if it were true that "personal income" was involved. Not only does the court's action deprive the District of Columbia of revenue from the very persons who are the most likely candidates to pay for doing business in the city, contrary to all principles of taxation, but the decision also forecasts the beginning of what may be an administrative quagmire.

I would affirm the order of the trial court denying the taxpayers' petitions for refunds.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12871, 12872, 12920, 12921

TAX 2362

RICHARD A. BISHOP, *Appellant,*

v.

DISTRICT OF COLUMBIA, *Appellee.*

* * *

DISTRICT OF COLUMBIA, *Appellant,*

v.

RICHARD A. BISHOP, *Appellee.*

TAX 2379

AXEL-FELIX H. KLEIBOEMER, *Appellant,*

v.

DISTRICT OF COLUMBIA, *Appellee.*

* * *

DISTRICT OF COLUMBIA, *Appellant,*

v.

AXEL-FELIX H. KLEIBOEMER, *Appellee.*

BEFORE: *Newman, Chief Judge, Kelly, Kern, Gallagher, Nebeker, Harris, Mack, Ferren and Pryor, Associate Judges, and Pair, Associate Judge, Retired.*

ORDER

In the above case, the last paragraph on page 285-E of the opinion of February 12, 1980, shall be deleted, and the following inserted in lieu thereof:

The division opinion, vacated June 11, 1979, is hereby reinstated and, with this elaboration, constitutes the en banc opinion of the court.

PER CURIAM.

Copies to:

HONORABLE JOHN GARRETT PENN
Clerk, Superior Court

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APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12871

RICHARD A. BISHOP, APPELLANT,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 12872

DISTRICT OF COLUMBIA, APPELLANT,

v.

RICHARD A. BISHOP, APPELLEE.

No. 12920

AXEL-FELIX H. KLEIBOEMER, APPELLANT,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 12921

DISTRICT OF COLUMBIA, APPELLANT,

v.

AXEL-FELIX H. KLEIBOEMER, APPELLEE.

[883]

Appeals from the Superior Court of the District of Columbia

(Hon. John Garrett Penn, Trial Judge)

(Argued May 10, 1978 Decided April 20, 1979)

John M. Bixler, with whom *Ronald D. Aucutt*, was on the briefs and supplemental memorandum of Richard A. Bishop.

Philip L. Kellogg, with whom *James L. Lyons* and *Bradley G. McDonald*, were on the briefs and supplemental memorandum of Axel-Felix Kleiboemer.

Louis P. Robbins, Acting Corporation Counsel, with whom *John R. Risher, Jr.*, Corporation Counsel at the time the briefs were filed and the case was argued, *Robert E. McCally*, Deputy Corporation Counsel, *Henry E. Wixon* and *Richard L. Aguglia*, Assistant Corporation Counsel, were on the briefs and supplemental memorandum for the District of Columbia.

Roger C. Ohlrich, Edward M. Luria and *Gregory Burr Macaulay*, filed a brief on behalf of the Bar Association Amicus Curiae.

Before KELLY and GALLAGHER, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

KELLY, *Associate Judge*: On June 24, 1975, the District of Columbia Council (hereinafter the Council), pursuant to the District of Columbia Self-Government and Governmental Reorganization Act (hereinafter the Home

Rule Act),[1] adopted the Revenue Act of 1975 (subsequently enacted as D.C. Law No. 1-23). The Act was signed by the Mayor and sent to both Houses of Congress for a 30-day review in accordance with § 602(c)(1) of the Home Rule Act.[2] It was not disapproved by a concurrent resolution and consequently became effective October 21, 1975.

The focus of the instant case is the validity of § 605 of the Revenue Act, codified at D.C. Code 1973, § 47-1574[3] (hereinafter the tax, the professional tax, or the unincorporated business tax), which repealed an existing "professional exemption," thereby allowing the District of Columbia to impose an unincorporated business tax upon unincorporated professionals and personal service businesses.[4] Appellant Bishop, a Virginia resident practicing

[1] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. Code 1978 Supp., §§ 1-121 to -171).

[2] Section 602(c)(1) provides that no act of the Council "shall take effect until the end of the 30-day period" after it has been transmitted to Congress "and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act." Pub. L. No. 93-198, 87 Stat. 813 (codified at D.C. Code 1978 Supp., § 1-147).

[3] For the sake of clarity and uniformity, all subsequent references to the tax will be cited to the D.C. Code. When discussing the extension of the tax to professionals, we cite to the Revenue Act (of 1975).

[4] Section 47-1574 was also the subject of litigation in two prior cases filed in the District of Columbia Courts. In the first case filed, *Committee for Fair Taxation of Professionals v. District of Columbia*, Civil Action No. 11269-75 (Sup. Ct. Feb. 14, 1977), a group of nonresident professionals sought declaratory and injunctive relief, claiming that § 47-1574 was an unauthorized exercise of the legislative powers of the Council and that it violated various provisions of the Consti-

law in the District of Columbia, and appellant Kleiboemer,[5] a Maryland resident also practicing in the District of Columbia, paid the District's unincorporated business tax for their respective 1975 calendar years, pursuant to § 47-1574. Appellants subsequently claimed a refund, and following denial of their claims at the administrative level, filed petitions for refunds in the Tax Division of the Superior Court, where their petitions were consolidated for trial.

On October 18, 1977, the trial court denied appellants' requests for refunds and dismissed their petitions with prejudice. It thereafter, sua sponte, ordered a rehearing on the provisions of the Act setting the effective dates of imposition of the tax. In a supplemental opinion dated October 27, 1977, the trial court held that imposition of the tax on members of the same class according to their respective tax years, calendar or fiscal, discriminated

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tution. On April 15, 1976, the District's motion for summary judgment was granted and the suit was dismissed. An appeal was taken but subsequently dismissed by consent of all parties as a result of the filing of the appeal in the instant case.

In the second case, *Commonwealth of Virginia v. District of Columbia*, Civil Action No. 76-0533 (D.D.C. June 1, 1976), the Commonwealth of Virginia, as parens patriae, brought a declaratory judgment action against the District of Columbia to have the professional tax declared void and unenforceable, stating the same claims as those raised in the *Committee* suit. On June 1, 1976, the Commonwealth's complaint was dismissed and on June 22, its motion to vacate and reconsider its order and for a rehearing was denied. No appeal was taken.

[5] Appellant Kleiboemer's suit was brought as a class action on behalf of all nonresident professionals subject to the tax in question. On October 17, 1977, the case was certified as a class action on behalf of all nonresident professionals subject to the tax and who had paid the tax, except for appellant Bishop.

against the calendar year taxpayers in favor of the fiscal year taxpayers. Accordingly, the court fixed the time for the start of tax liability for all members of the class as of December 1, 1975—the earliest date on which the tax would apply to all taxpayers using the latest (December through November) fiscal year—and ordered the appropriate refunds to the class of affected taxpayers.

Appellants Bishop and Kleiboemer appealed the trial court's order of October 18; the District of Columbia cross-appealed the October 27 supplemental order.[6] Appellants contend on appeal that the professional tax (1) is an unauthorized exercise of the legislative powers of the Council under the Home Rule Act; (2) is in violation of several provisions of the United States Constitution; and (3) does not comply with the notice requirements of the Home Rule Act and City Council Resolution 1-1-2. Appellee argues that the trial court improperly held that the effective date provisions of the Act discriminate against calendar year taxpayers in favor of fiscal year taxpayers. For the reasons which follow, we reverse.

Appellants' initial challenge to § 47-1574 is that it is an *ultra vires* measure, enacted by the Council in violation of its delegated powers. Thus, the central issue is whether that section violates the limitation imposed on the legislative authority of the Council by § 602(a)(5) of the Home Rule Act (codified at D.C. Code 1978 Supp., § 1-147(a)(5)), which provides in pertinent part:

> The Council shall have no authority . . . to
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> * * * *

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[6] Throughout this opinion, reference to appellants means appellants Bishop and Kleiboemer.

> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

The question is whether § 47-1574 imposes a tax on the personal income of nonresidents or whether the tax is levied on something other than income (*e.g.*, the privilege of doing business in the District). If the former is the case, the law is an impermissible exercise of the Council's legislative authority in the area of taxation and must be declared invalid.

The District of Columbia Revenue Act of 1947, Pub. L. No. 80-195, 61 Stat. 398, enacted by Congress on July 16, 1947, imposed, *inter alia*, a tax on incorporated and unincorporated businesses for the privilege of carrying on a trade or business within the District and of receiving income from sources within the District. D.C. Code 1973, §§ 47-1571a, -1574b. The purpose of the unincorporated tax was to

> impose a tax upon all business income which would be subject to the corporation franchise tax, if incorporated, regardless of whether the business is carried on by an individual, by a partnership, or by some other unincorporated entity. [Section 8-1(b) of the Regulations of the Government of the District of Columbia, promulgated August 28, 1947 (Title 16, DCRR Part 307, p. 122).]

In defining the term "unincorporated business," however, Congress excluded a trade or business

> which by law, customs or ethics cannot be incorporated . . . or any trade or business in which more than 80 per centum of the gross in-

> come is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income producing factor. [*See* D.C. Code 1973, § 47-1574.]

When the Professional Corporation Act (P.L. No. 92-180, 85 Stat. 576 (1971)) was enacted, the D.C. Income and Franchise Act was amended to maintain the exemption for unincorporated professional associations. The legislative history indicates the following concerns underlying preservation of the exemption at that time:

> [r]epresentatives of the Bar Association, for example, stated they have opposed previous attempts to repeal this exemption on essentially two grounds. Both the States of Maryland and Virginia grant a credit to their residents for income taxes paid to another jurisdiction on income generated in that jurisdiction. The District unincorporated business tax does not qualify for this credit since it is a *franchise tax* rather than an income tax. Accordingly, the professional who resides in Maryland or Virginia and conducts his practice in the District would, if his present tax exemption were removed, be subject to double tax on the net income for his practice. [H.R. REP. No. 92-508, 92d Cong., 1st Sess. (1971) at 4 (emphasis supplied).]

Section 605 of the Revenue Act of 1975 repealed this professional exemption (by deleting the second sentence

of § 47-1574),[7] thereby allowing the District of Columbia for the first time to impose the unincorporated business tax upon unincorporated professionals and personal service businesses, which, by their nature, do not require a physical nexus with the District in order to do business in the District. Therefore, the tax on the income of unincorporated businesses suddenly burdened the personal income of thousands of previously untaxed individuals who do not reside in the District. The issue is does this tax, in light of its incidents and effects, circumvent the stated intention of Congress.

Although the legislative history of § 602(a)(5) of the Home Rule Act (codified at D.C. Code 1978 Supp., § 1-147(a)(5)), is slight, we do know that by adopting the provision, Congress intended to prevent the District from enacting a commuter tax. STAFF OF THE SENATE COMM. ON THE DISTRICT OF COLUMBIA, 93RD CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT 1469-70 (Comm. Print 1974).[8] A commuter

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[7] That sentence read:

> The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under chapter 11 of title 29, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.

[8] "[The Bill] states there shall not be a commuter tax, and it is very plain. Until Congress repeals this there shall not be a commuter tax." *Id.* at 1469 (Statement of Rep. Rees, D. Calif.).

tax, loosely defined, is a levy by a jurisdiction upon individuals who do not live in that jurisdiction but work there on a daily basis.[9] Although the levy could, conceptually, attach to any basis, Congress specifically provided in the act that the District of Columbia could enact no tax which levied upon personal income of nonresidents. In terms of art,[10] Congress' proscription meant that no commuter tax could be levied on net income.

The general definition of commuter tax presented above is, by necessity, overbroad. Indeed, it is the breadth of such a tax which presents us with problems here. Were the commuter tax a simple, discernible fiscal tool, we could simply look to the incidents of the tax and determine if they were on all fours with the tax presented here. Since such an endeavor is not possible, we must accept at their literal meaning the words Congress chose to use in prohibiting the commuter tax, namely, a "tax . . . on personal income" of nonresidents. In doing so, we can come to no conclusion other than that the professional tax is such a tax.

A conflict of authority presently prevails in neighboring jurisdictions as to whether this tax is an income tax. *Compare Gardella v. Comptroller of Maryland*, 213 Md.

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[9] Of course, if there is a sufficient nexus between that individual and the jurisdiction, such as a corporation which does business exclusively within the jurisdiction, then the tax is no longer a commuter tax. For that and other obvious reasons, a commuter tax could be levied only on natural persons.

[10] Absent a succinct statement of congressional intent to the contrary, we interpret the words "impose a tax on the personal income of . . . nonresidents" by reference to their technical meaning as accepted by the courts, legislatures, and the tax bar.

1, 130 A.2d 752 (1957), *with Groom v. Forst*, At Law No. 18809 (filed March 30, 1978) (*aff'd on rehearing mem.*, Oct. 23, 1978). The issue in both *Gardella* and *Groom* was whether the tax paid pursuant to § 47-1574 was an "income tax" paid to a foreign jurisdiction. As an income tax, the amount paid to another state can be taken under both Maryland and Virginia law as a direct credit against income taxes paid to them. *See* Md. Code 1951, § 81-286(h); Va. Code 1974, § 58-151.015. Although both the *Gardella* and *Groom* courts addressed the threshold characterization question that we face herein—income versus franchise—those courts came to opposite conclusions. In *Gardella*, the Maryland Court of Appeals ruled that the unincorporated business tax is not an income tax; in *Groom*, the Circuit Court of Arlington County, Virginia, ruled that that same unincorporated business tax, as applied to professionals, is an income tax.[11] The *Groom* court based its ruling on the fact that the tax "seeks out a net gain or profit." As the court stated:

> Although this Congressional prohibition [§ 602(a)(5)] has served to protect nonresidents of the District of Columbia who are salaried employees or wage earners from D.C. income taxes, the removal of the exemption . . . by the D.C. Council had the effect of subjecting all persons engaged in business, self-employed trades or professional occupations *to the same* tax in

[11] The question of whether the unincorporated business tax as applied to professionals is in violation of the Home Rule Act was not before the Virginia court and was not addressed by that court. The sole issue in *Groom* was whether the Virginia taxpayer was entitled to a credit against his Virginia taxes.

> another guise. [*Groom v. Forst*, *supra* at 3 (emphasis supplied).]

As to the characterization of a tax, it is fundamental that the nature and effect of a tax, not its label, determine if it is an income tax or not. *E.g.*, *Dawson v. Kentucky Distilleries*, 255 U.S. 288, 292 (1921); *Commissioner v. American Metals Co.*, 221 F.2d 134, 137 (2d Cir.), *cert. denied*, 350 U.S. 829 (1955); *New York and Honduras Rosario Mining Co. v. Commissioner*, 168 F.2d 745 (2d Cir. 1948). While it is true that mere legislative designation that a tax is of a particular character is not controlling,[12] that designation is entitled to much weight. *County Commissioners of Anne Arundel County v. English*, 182 Md. 514, 522, 35 A.2d 135, 143 (1943); *accord*, *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910).

The District of Columbia Code calls this tax an unincorporated business franchise tax. Even if we were to find that in form and substance the unincorporated business tax is a franchise tax, however, our inquiry would not stop there. Franchise taxes can be considered property taxes, excise taxes, gross income taxes, and most importantly, income taxes,[13] depending on the incidents of taxation. While thirty-one states and this jurisdiction levy a franchise tax, [1958 All States] STATE TAX CAS. REP. (C.C.H.) ¶ 700, some levy that tax on an annual basis, some on an initial basis; some measure the tax on the basis of gross income, some on the basis of net in-

[12] This is particularly true when it is apparent that the tax at issue cannot be so designated consistently with the meaning and effect of the Act. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 145 (1910).

[13] *See* the discussion of the distinction between gross income taxes and (net) income taxes, *infra*.

come; some merely assess a flat fee. Therefore, Pennsylvania's tax on the capital stock of domestic corporations was termed a property tax. *Commonwealth v. Standard Oil Co.*, 101 Pa. 119 (1882). In similar fashion, the Supreme Court of Minnesota has held that its franchise tax is an ad valorem property tax, the value of the property being measured by the net income of the corporation. *The Pullman Co. v. Commissioner*, 223 Minn. 96, 25 N.W.2d 838 (1947). In *Republic Acceptance Corporation v. DeLand*, 275 F. 632 (E.D. Mich. 1921), the United States District Court held that Michigan's franchise tax was in actuality an excise tax. Other jurisdictions have likewise styled their tax a franchise tax only to have the courts intercede to reclassify the tax. *See, e.g., Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950) (privilege tax was an excise tax); *State ex rel. McKay v. Keller*, 140 Fla. 346, 191 So. 542 (1939) (license tax was an income tax); *Commissioners of Sinking Fund v. Howard*, 248 S.W.2d 340 (Ky. 1952), *aff'd*, 344 U.S. 624 (1953) (occupational license tax was an income tax); *City of Louisville v. Sebree*, 308 Ky. 420, 214 S.W.2d 248 (1948) (license fee was an occupation tax); *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S.W.2d 438 (1947) (earnings tax was an income or an excise tax).

The impact of this judicial reclassification is most telling when viewed in terms of the gross receipts/net income distinction. A tax on gross receipts is not the same as a tax on net income. The former contemplates an annual levy on the total receipts of the taxpayer, regardless of the cost of attaining those receipts. *Cf. Northwest Lumber Co. v. Wisconsin Tax Commissioner*, 202 Wis. 372, 231 N.W. 865 (1930) (income taxes are assessed on actual profit or loss); *People ex. rel. Klauber v. Wendell*, 196 App. Div. 827, 188 N.Y.S. 301, *aff'd*, 232 N.Y. 549, 134 N.E. 567 (1921) (income tax on

gains from sale or disposition, levied only if there is an actual gain or profit). The latter denotes gross income less certain deductions. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179 (1918); *People ex. rel. Standard Oil Co. of New York v. Law*, 237 N.Y. 142, 142 N.E. 446 (1923). *But see Jones v. United Artist Corp.*, 305 U.S. 410 (1939) (gross income tax levied on income less deductions allowed by statute).

The distinction between a tax on gross receipts and one on net income is important. When a jurisdiction taxes net income, it does so, in effect, because its object is to raise revenue by taxing the consumable wealth of its taxpayers. *See generally* Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1967), discussed in Comment, *Tax Policies in Relation to Nonbusiness Legal Expenses and Prepaid Legal Services*, 26 AM. U.L. REV. 451, 491-93 & n.236 (1977) [hereinafter cited as *Tax Policies*]. Moreover, it seeks to serve auxiliary purposes such as redistribution of wealth, equalization of consumption, and taxation of the ability to pay. *E.g., Tax Policies, supra* at 491-93. One thing is clear, a net income tax seeks to tax only disposable income. *See, e.g., id.* at 486; I.R.C. §§ 162(a), 212.

A tax on gross receipts offers a very different result. Since a gross receipts tax can be collected even if the taxpayer has no funds remaining, after legitimate expenses, with which to pay the tax, the tax cannot be one on personal wealth. Rather a gross receipts tax is levied for the purpose of either taxing a privilege, such as the right to do business,[14] or simply raising revenue, as in the case of the sales tax.

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[14] In this respect, a gross receipts tax is similar to an annual graduated license fee based on the amount of business done as measured by gross receipts.

The Court of Appeals of Maryland called the District of Columbia Unincorporated Business Tax a franchise tax. *Gardella v. Comptroller of Maryland, supra.* Virginia calls it an income tax. *Groom v. Forst, supra.* New York treats both its franchise [15] and its unincorporated business tax as income taxes. *People ex. rel. Froelick v. Graves,* 259 App.Div. 30, 18 N.Y.S.2d 418 (1940) (unincorporated business tax); *People ex. rel. Alpha Portland Cement Co. v. Knapp,* 230 N.Y. 48, 129 N.E. 202 (1920) (franchise tax). Consonant with the analysis presented above, we agree with New York and Virginia.

The court in *Gardella* relied heavily on the decision in *Keasbey & Mattison Co. v. Rothensies,* 133 F.2d 894 (3d Cir.), *cert. denied,* 320 U.S. 739 (1943). In a much quoted passage, the court there stated:

> The Supreme Court, without advancing any precise definition of the term "income tax," has unmistakably determined that taxes imposed on subjects other than income, e.g., franchises, privileges, etc., are not income taxes, although measured on the basis of income. [*Id.* at 897].

We can, and do, agree with that language and still hold that the D.C. unincorporated business tax is an income tax. The court in *Keasbey* noted the same distinction that we note here: a tax on gross receipts is not an income tax; a tax on net income is so, regardless of its nomenclature. *Id.* at 898.[16]

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[15] The District of Columbia corporate franchise tax implicitly has been treated, by this court, as an income tax. *See Jantzen, Inc. v. District of Columbia,* D.C.App., 395 A.2d 29, 31 (1978).

[16] The court implicitly drew this distinction. In holding that the tax contained in the Quebec Mining Act was not an income tax, the court noted:

[Continued]

The professional tax, by its very terms, is a tax on net income. D.C. Code 1973, § 47-1574a defines taxable income, for purposes of the tax on unincorporated businesses, as "the amount of *net income* derived from sources within the District . . . in excess of the exemption granted by section 47-1574c (emphasis added)." Net income is defined in D.C. Code 1973 and 1978 Supp., §§ 47-1557 to -1557b. *Cf.* D.C. Code 1978 Supp., § 47-1557b(b)(5) (disallowing the deductions allowed in subsection (a) for individuals who share in the net income of an unincorporated business and who have used those deductions in determining the net income of the unincorporated business).

Appellee would have us hold that this tax is a tax on the right to earn income in the District, measured by the amount of income earned, and nothing more. That argument would be persuasive if the incident of this tax were the right to do business. Were such the case, the tax would be levied upon any act of earning income, regardless of any other consideration. Since a nonresident could earn substantial income within the District, but because of business expenses, medical expenses, interest payments, and the like, pay very little tax,[17] it cannot

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[16] [Continued]

> It is significant that the allowable deductions are restricted to the costs actually incurred in the mining operation and nothing more. The expenses incident to the general conduct of the business, as distinguished from the costs incurred in the mining operation, are not deductible. [*Keasbey & Mattison Co. v. Rothensies, supra* at 898.]

The restricted nature of the allowable deductions demonstrated Quebec's desire to tax the output of the mines and not the wealth of the corporation.

[17] The minimum tax payable is $25. Appellee urges that to the extent some tax is payable even if no profits are earned,

be said that the tax falls solely on the right to earn income within the District.

Appellants cite a long line of cases and revenue rulings in support of their position that the tax is an income tax. *E.g., Commissioner v. American Metal Co., supra; New York & Honduras Rosario Mining Co. v. Commissioner, supra*; Rev. Rul. 435, 1974-2 C.B. 204; Rev. Rul. 588, 1973-2 C.B. 268. In addition, they highlight the historical aspects of the tax for the proposition that it was intended to tax personal income. While we find the former argument more persuasive than the latter, the result is, nonetheless, that this tax is levied upon net income.[18]

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the tax has the attributes of a franchise tax. While we agree that a flat fee would not violate the Home Rule Act, we cannot agree that the single provision for a minimum payment can sustain this tax. By design and in practice, the tax vests on net income; in only exceptional circumstances would the tax liability be assessed by any other measure.

[18] The scheme of the tax further demonstrates its nature as a personal net income tax. In order to determine taxable income, the taxpayer first must determine the gross income of the unincorporated business. From that amount, the taxpayer may exclude items designated as excludable in D.C. Code 1973 & 1978 Supp., § 47-1557a, and deduct amounts allowable under D.C. Code 1973 & 1978 Supp., § 47-1557b, with the exception of the reasonable wages deduction found in D.C. Code 1978 Supp., § 47-1557b(a)(15). The taxpayer then takes his wages paid deduction, which cannot be greater than 70% of net income computed without this deduction. *Id.* Since the tax is on unincorporated businesses, and is therefore in reality a tax on the associates or partners who run the business, D.C. Code 1973, § 47-1574d, *see* discussion *infra*, the computation of wages paid is usually artificial. The figure thus derived is called net income. Taxable income is ascertained by reducing net income by a set exemption of $2,500 for a personal service organization (as defined by the code) or $5,000 for all other unincorporated businesses. D.C. Code 1978 Supp., § 47-1574c. The tax liability is determined by taking a set percentage

The tax is levied upon personal income. If we dealt here with a corporate franchise tax, the result would be different. To the extent that we deal with individuals who are professionals and are not protected by the corporate veil, we must find that the tax burdens the taxpayer personally.

We do not by this opinion mean to imply that the District of Columbia cannot tax nonresident professionals who operate an unincorporated business. We say only that the District of Columbia cannot tax the net personal income of nonresidents.[19]

For the above reasons, we conclude that the professional tax here at issue is an invalid exercise of the City Council's legislative authority under the Home Rule Act.[20] Accordingly, the judgments on appeal in Nos. 12871 and 12920 are reversed and the appeals in Nos. 12872 and 12921 are dismissed.

So ordered.

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of taxable income; to wit, 12% for 1975 and 9% thereafter. The minimum tax liability is $25. D.C. Code 1978 Supp., § 47-1574b; *see* note 15 *supra*. The individuals who conduct the unincorporated business are jointly and severally liable for the tax. D.C. Code 1973, § 47-1574d.

[19] A number of the aspects of the current tax could be retained and pass our scrutiny. The $25 minimum tax certainly does not suggest a tax on net income. The same may be true for certain deductions as long as they merely serve to adjust the tax base, reflect the true incident of taxation, and facilitate the tax. *Keasbey & Mattison v. Rothensies, supra* at 898.

[20] In view of this disposition of the case, we need not discuss the other issues raised by Bishop and Kleiboemer on appeal or those raised by the District on cross-appeal.

APPENDIX D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2362

RICHARD A. BISHOP, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Docket No. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

ORDER AND OPINION

These petitioners have filed these actions in order to obtain a refund for franchise taxes paid to the District of Columbia pursuant to D. C. Code 1973, § 47-1574 *et seq.* (Supp. IV 1977). The amount of the tax is not in dispute, however, the petitioners challenge the legality of the tax and have requested the court to declare D. C. Law No. 1-23 to be a tax on all or a portion of the personal income of these petitioners, to rule that the tax unlawfully discriminates against nonresident owners of unincorporated personal service businesses in the District of Columbia and to further rule that that tax was enacted without adequate public notice as guaranteed by D. C. Code 1973, § 1-144(c) (Supp. IV 1977).

The two cases have been consolidated for purposes of this appeal and the Court has granted the request of petitioner Kleiboemer to treat this case as a class action with

that class consisting of those nonresident taxpayers who have paid the tax imposed by Section 47-1574. The class which petitioner Keiboemer represents does not include petitioner Bishop.[1]

I

The facts in this case have been fully stipulated and the parties have also stipulated a number of joint exhibits. Based upon that stipulation of facts the Court makes the following findings of fact:

1. The application of an unincorporated business franchise tax to unincorporated professions and unincorporated personal service businesses by the Revenue Act of 1975 (D.C. Law No. 1-23) was accomplished by the District's repeal of the exemption afforded to professionals and personal service businesses contained in D. C. Code 1973, § 47-1574. Before the adoption of Section 605 of the Revenue Act of 1975, Section 47-1574 read as follows:

> "For the purposes of this subchapter (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" means any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under sections 47-1571 and 47-

[1] This Court had previously dismissed an action in which another petitioner had requested injunctive relief. *Committee for Fair Taxation of Professionals* v. *District of Columbia,* Civil No. 11269-75. That case is presently on appeal and these petitioners have incorporated the record in that case as a part of the record in this case.

> 1571a. The words "unincorporated business" do not include any trade or business which by law, custom, or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under chapter 11 of title 29, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor."

Section 605 of the Revenue Act repealed the "professional" exemption by deleting the second sentence contained in section 47-1574.

2. The rate of tax on unincorporated businesses was imposed under D. C. Code 1973, § 47-1574b which, before the adoption of section 604 of the Revenue Act of 1975, read as follows:

> For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 8 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be $25.00.

Section 604 of the Revenue Act of 1975 amended section 47-1574b and as amended that section reads as follows:

> For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for one taxable year beginning on or after January 1, 1975, a tax at the rate

> of 12 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be $25.00. For the taxable years beginning on and after January 1, 1976, there is hereby levied a tax at the rate of 9 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be $25.00.

3. The only notice of Council hearings to appear in the D. C. Register on the Mayor's proposed Revenue Act of 1975 was dated March 6, 1975, and was published in the March 10, 1975, edition of the District of Columbia Register. (Joint Ex. 1.)

4. A copy of the Mayor of the District of Columbia's proposed Revenue Act of 1975, which included legislation proposing a gross receipts tax upon professionals and other business entities, but not the unincorporated business franchise tax here in dispute, was published in the March 21, 1975, edition of the D. C. Register. (Joint Ex. 2.)

5. Section 404(c) of the D. C. Self-Government Act, (D.C. Code 1973, § 1-144(c) (Supp. IV 1977)), provides:

> The Council shall adopt and publish rules of procedures which shall include provisions for adequate public notification of intended actions of the Council.

6. Pursuant to section 404(c), the Council adopted Resolution No. 1-1-2 on January 7, 1975. Section 6G of the Resolution provides:

> The Council shall, at least fifteen (15) days prior to the adoption of any act, resolution, rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally

served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing as may be specified in such notice. Resolution No. 1-1-2, adopted on January 7, 1975, Section 6G.[2]

7. On or shortly after March 6, 1975, copies of the District of Columbia City Council's notice of hearings, as described in paragraph 3 hereof, were mailed by the Council's Committee on Finance and Revenue to the numerous persons and organizations including bar associations, civic associations, and other professional associations. (Joint Ex. 3.)

8. The record of the hearings held by the Council's Committee on Finance and Revenue pursuant to the notice described in paragraph 3 above is contained as an appendix to the *Hearings Before the Committee in the District of Columbia United States Senate on the District of Columbia Revenue Act of 1975,* 94th Congress, First Session, Sept. 8-11, 1975, Part I, pp. 463-838. (Joint Ex. 4.)

9. The May 30, 1975, edition of the Washington Post contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 5.)

10. The June 2, 1975, edition of the Washington Post contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 6.)

11. The June 6, 1975, edition of the Washington Star contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 7.)

12. On June 24, 1975, the Council of the District of Columbia passed at second reading the Revenue Act of 1975 (Act No. 1-34) which included the repeal of the "professional" exemption, as described in Finding of Fact No. 1.

[2] Section 6G has since been amended to require publication at least 30 days prior to any intended legislative action. Resolution PR No. 1-30.

13. The June 25, 1975, edition of the Washington Post contained an article concerning the Council's action on the Budget including their repeal of the exemption. (Joint Ex. 8.)

14. A meeting regarding the imposition of the tax here in controversy was held by Edward Meyers, Staff Director of the Council's Committee on Finance and Revenue, on June 30, 1975. The meeting was attended by members of the council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar. These persons, (excluding District of Columbia employees) questioned the amount of revenue estimated by the Department of Finance and Revenue to be gained by the imposition of the tax in controversy and asked the Committee to consider possible alternatives to it.

15. On July 8, 1975, a meeting was again held by the Committee on Finance and Revenue with respect to the tax here in controversy. The meeting was attended by members of the Council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar.

The amount of revenue to be gained by the imposition of this tax was again discussed as well as possible alternatives to it.

16. On July 14, 1975, Councilmember Barry sent a memorandum entitled "Professionals in the Unincorporated Business Tax" to Kenneth Back, Director of the Department of Finance and Revenue. That memorandum requested a meeting with members of the Department of Finance and Revenue to discuss the unincorporated business tax. (Joint Ex. 9.)

17. The July 16, 1975 editions of both the Washington Post and Washington Star contained articles concerning the opposition to the tax on professionals. (Joint Exs. 10 and 11.)

18. On July 16, 1975, Councilmember Barry sent a memorandum entitled "Professionals in the Unincorporated Business Tax" to C. Francis Murphy, then Corporation Counsel of the District of Columbia inviting further discussion on the removal of the exemption and alternatives thereto. (Joint Ex. 12)

19. On July 21, 1975, a memorandum entitled "The Unincorporated Business Franchise Tax Section of the Council's Revenue Act of 1975" answering the July 16, 1975, memorandum described in Finding No. 18 hereof was sent from C. Francis Murphy to Councilmember Barry. (Joint Ex. 13.)

20. On July 21, 1975, a meeting of the Committee on Finance and Revenue was held to discuss the tax here in controversy. The meeting was attended by members of the Council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar.

At the conclusion of that meeting, the Committee voted to amend from 20% to 50% the maximum salary allowance for professionals that they would recommend to the Council of the District of Columbia.

21. On July 22, 1975, the Committee on Finance and Revenue again met, further considered the percentage of salary allowance to be recommended, and voted to amend the amount allowed from 50% to 55% of net income.

22. On August 5, 1975, the Council of the District of Columbia passed at second reading Act No. 1-43, which raised the salary allowance described in paragraphs 20 and 21 hereof from 20% to 55%. (Joint Ex. 14.)

23. The August, 1975 edition of the Washington Metropolitan Board of Trade News contained an article, concerning the proposed tax on professionals. (Joint Ex. 15.)

24. Hearings on the tax in dispute were held in both the House of Representatives and the Senate of the United

States Congress during the month of September 1975. The testimony and exhibits introduced at those hearings are contained in one volume entitled "*Hearings and Disposition before the Subcommittee on Fiscal Affairs of the Committee on the District of Columbia House of Representatives to Disapprove the District of Columbia Revenue Act of 1975 and to Amend the District of Columbia Tax Laws Applicable to Unincorporated Business Income,*" 94th Congress, First Session, September 17 and 19, 1975, (Joint Ex. 16), and in two volumes entitled "*Hearings Before the Committee on the District of Columbia United States Senate on the District of Columbia Revenue Act of 1975*", 94th Congress, First Session, September 8-11, 1975 (Joint Exs. 4 and 17.)

25. On October 2, 1975, Councilmember Barry sent a memorandum entitled "Committee Report on Bill 1-188, the 'Amended District of Columbia Unincorporated Business Franchise Tax Revision Act of 1975' " to all members of the council of the District of Columbia. (Joint Ex. 18.) The primary purpose of the Bill was to propose a salary allowance of 70% for professionals and other personal service businesses with a standard exemption of $2500.

26. On October 7, 1975, the Council of the District of Columbia passed the District of Columbia Professional Corporation Revision Act of 1975 (Act No. 1-61), which was signed by Mayor Washington on October 29, 1975. On November 11, 1975, Act No. 1-61 was transmitted to Congress for review. Act No. 1-61 amends the District of Columbia Professional Corporation Act (D. C. Code 1973, § 29-1101 et seq.) by treating professional corporations as "unincorporated businesses" for purposes of the Act of 1947. No other corporations are so treated. (Joint Ex. 19.)

27. On October 10, 1975, Councilmember Barry sent a memorandum to all members of the Council of the District

of Columbia entitled "Amended Committee Report, Bill 1-170, the District of Columbia Professional Corporation Revision Act of 1975". (Joint Ex. 20.)

28. On October 21, 1975, the Revenue Act of 1975 became law (D. C. Law No. 1-23) pursuant to Section 602(c)(1) of the Self-Government and Governmental Reorganization Act (D. C. Code 1973, § 31-147(c)(1), (Supp. IV, 1977) which reads as follows:

> (c)(1) Except acts of the Council which are submitted to the President in accordance with the Budget and Accounting Act, 1921 [31 U.S.C. 1 et seq.], any act which the Council determines acording to section 412(a), should take effect immediately because of emergency circumstances and acts proposing amendments to title IV of this Act, the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting (and with respect to which the President has not sustained the Mayor's veto), and every act passed by the Council and allowed to become effective by the Mayor without his signature. Except as provided in paragraph (2), no such act shall take effect until the end of the 30-day period (excluding Saturdays, Sundays, and holidays, and any day on which either House is not in session) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act. The provisions of section 604, except subsections (d), (e), and (f) of such section, shall apply with respect to any concurrent resolution disapproving any act pursuant to this paragraph.

29. On November 1, 1975, Act No. 1-62 became law (D.C. Law No. 1-31) pursuant to the provisions of the Self-Government Act described in Finding No. 28.

30. As of March 30, 1976, according to the records of Lawrence Cook, Assistant Supervisor of the Business Registration Section of the Department of Finance and Revenue of the District of Columbia Government, approximately 1064 unincorporated business franchise tax returns had been filed on an estimated basis by professionals and personal service businesses subject to this tax for the first time. Of the returns filed, approximately 1060 were filed with either partial of full payment of the amount of tax estimated.

31. Section 602(a)(5) of the D.C. Self-Government and Governmental Reorganization Act, (D. C. Code 1973, § 1-147(a)(5) (Supp. IV 1977)) as enacted by the Congress of the United States limits the legislative authority of the Council of the District of Columbia with respect to the taxation of nonresidents of the District of Columbia as follows:

> § 1-147. Limitations.
>
> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to—
>
> * * * *
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 47-1551c;

32. Under the provisions of D. C. Code 1973, § 47-1557a(b) (10) there is excluded from the gross income of District of Columbia resident taxpayers that portion of an individual taxpayer's gross income which has been taxed

under the provisions of the unincorporated business franchise tax, D. C. Code 1973, § 47-1574 *et seq.*, (Supp. IV 1977).

II

The petitioners' first contention is that so much of the Revenue Act of 1975 which purports to amend Section 47-1574 is invalid due to the failure of the City Council to publish adequate notice as required by D. C. Code 1973, § 1-144(c) (Supp. IV 1977) and Resolution No. 1-1-2 adopted January 7, 1975.[3]

All of the underlying facts are set forth in the Findings of Fact therefore the Court need only refer to the more pertinent facts at this time.

The Mayor sent his proposed Revenue Act of 1975 to the City Council in early 1975. A notice of Council hearings dated March 6, 1975, was published in the District of Columbia Register on March 10, 1975. There is no dispute that a proper notice published in the District of Columbia Register would be in full compliance with the notice requirements. The notice gave the time, date and place for the hearings "on the impact of revenue proposals contained in the Mayor's Fiscal 1976 Budget". It went on to provide:

> Comments are welcome on tax and related revenue measures contained in the Budget (property, sales, income, other) *and on new and alternative methods of raising revenue for the District of Columbia.* (Emphasis this Court's.)

It then set forth a schedule of meetings to be held on March 18, April 3 and April 4, 1975, and advised the reader that on each day the Committee on Finance and Revenue would hear witnesses on the "entire revenue package" and

[3] The text of both the statute and the resolution are set forth in Findings of Fact Nos. 5 and 6.

on "*new revenue ideas*" (emphasis this Court's). The notice set forth the name and number of the person to contact if a citizen wished to offer testimony and "encouraged" written statements and advised those offering such statements that the "record will be closed on April 7, 1975". Setting aside for the moment the issue before the Court, it can be observed that the above notice was complete and met all due process requirements. Any person wishing to be heard was advised of the exact procedure he should follow.

Petitioners argue that the notice was invalid however because it failed to give notice that the Council would or might consider the repeal of the exemption granted to the petitioners under Section 47-1574. Actually, although the proposed Revenue Act of 1975 did purport to amend Section 47-1574, it did not in any way suggest a repeal of the exemption granted to the petitioners under that section. Thus, the petitioners argue that the notice itself did not suggest that the Council would consider removing the exemption from the franchise tax and that they were further mislead because the proposed Revenue Act of 1975, which was the subject of the hearing, did not purport to amend Section 47-1574 so as to delete the exemption.

The respondent contends on the other hand that the original notice was adequate but that in any event, there was adequate opportunity for the petitioners and their class to comment or submit written submissions subsequent to June 24, 1975, the date when the amended Act was finally passed by the City Council.

Before addressing the adequacy of the notice of March 10, 1975, this Court notes that it finds that respondent's arguments that any defect was cured by the new hearings held in July and August 1975, after the challenged Act had been passed, to be totally without merit. First, the Act had already been passed and second the primary discussion of the hearings at that point was not whether the exemption should be repealed or reinstated as the case may

be, but rather whether the salary allowance allowed professionals should be increased. Such comments or hearings after passage of the Act hardly amounts to what is contemplated by Section 1-144(c) or Resolution No. 1-1-2. The Resolution clearly provided for a notice at least "Fifteen (15) days *prior* to the adoption of any Act."[4] Moreover, the purpose of the notice before the adoption of an act is "to afford interested persons opportunity to submit data and views either orally or in wrting as may be specified in such notice". Resolution No. 1-1-2. This Court holds that the notices of hearings after the adoption of the Act failed to satisfy the mandatory requirements for notice.

The respondent also argues that notices were mailed to numerous persons and organizations. This argument also fails however, since presumably the notice was the same as that published in the District of Columbia Register and more important, because the notice was not sent to "*all* persons subject thereto". See Resolution 1-1-2, § 6G. Any attempt to give actual notice to all taxpayers or potential taxpayers who may be the subject of a particular tax enactment is risky business at least and for this very reason the Council has provided for constructive notice by publishing in the District of Columbia Register.

Respondent also argues that the petitioners and their class received actual or constructive notice by virture of a number of articles published in the Washington Post and the Washington Star. The argument that such publications are actual notice must fail for the reasons just discussed and the Resolution provides for publication for the purpose of constructive notice *only* in the District of Columbia Register. Last, there is no suggestion that the "notices" found in the Washington Post and the Washington Star, if they can be so described, were in the required notice form giving the subject, the date, the time, and the place of the

[4] Since amended to thirty (30) days. Resolution PR No. 1-30.

hearings and of procedures for appearing before the Council or submitting written comments.

As is readily apparent, the question concerning notice can only be resolved by looking at the notice published in the District of Columbia Register on March 10, 1975. If that notice failed to comply with the notice requirements, which are mandatory in this case, then so much of the Revenue Act of 1975 which repeals the petitioners' exemption under Section 47-1574 is invalid. *See* 5 McQuillin, Municipal Corporations, §§ 16.76, 16.77 (3d ed, 1969 Revised Volume).

Turning to the March 10, 1975 notice, this Court concludes that petitioners argument that the notice is invalid must fail. As already noted, the form of the notice complied with all legal requirements.

While it is true that the notice itself did not refer to the possible repeal of the exemption which is the subject of these petitions, it did make quite clear that the Committee on Finance and Budget would not only consider the Mayor's Budget but also "new and alternative methods of raising revenue for the District of Columbia". The schedule advised that "new revenue ideas" would be discussed on each hearing day. The above language put the petitioners and the members of their class on notice that their exemption might be the subject of discussion and repeal notwithstanding the fact that the Mayor's proposed Budget would have continued the exemption. "New" methods refers to metnods not yet in use and "alternative" methods refers to alternatives to some or all of the Mayor's proposal. It also cannot be overlooked that the attention of one interested in the franchise tax exemption would have been drawn to Section 47-1574 since the Mayor's proposal itself would have amended that very section even though not repealing the specific exemption.

The challenged notice left no doubt that the Council would consider, not only the Mayor's tax proposals, but any

and all reasonable alternatives thereto. The Council made significant changes to the proposal but those changes were the direct result of the Council's consideration of "new and alternative methods of raising revenue" which result was a "logical outgrowth of the hearing and related procedures". Moreover, "[p]arties have no right to insist that a rule remain frozen in its vestigal form". *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646, 659 (1st Cir. 1974). The facts in *South Terminal Corporation,* although not involving taxes, are similar to those here and the Court while noting substantial changes between what had been proposed and what was adopted nevertheless found the notice adequate. That court's comments have equal applicability here when it concluded that "interested persons were sufficiently alerted [by the notice] to likely alternatives to have known what was at stake." Id. at 659. There the published notice mentioned alternative measures for effective reduction in the number of parking spaces in downtown Boston; here the notice made mention of "new and alternative methods of raising revenue."

To follow petitioners argument would mean that the Council "can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary". *International Harvester Co.* v. *Ruckelhaus,* 155 U.S. App. D.C. 411, 428, 478 F.2d 615, 632.n. 51 (1973). See also *Owensboro On The Air, Inc.* v. *United States,* 104 U.S. App. D.C. 391, 262 F.2d 702 (1959); Davis, Administrative Law of the Seventies, § 6.01-1 (1976).

The notice in this case was fair and was reasonably calculated to put interested persons on notice that new and alternative tax measures to raise revenue were being considered by the Council. That notice gave sufficient and adequate notice of the Council's consideration of Section 47-1574 and of its amendment of that section repealing the exemption now challenged.

III

The petitioners next argue that, even though this Court should find there was adequate notice of the intent to amend or consider amendment of Section 47-1574 so as to repeal the exemption granted petitioners, such action was beyond the power of the Council due to the limitations on Council power to enact legislation contained in D. C. Code 1973, § 1-147(a) (5) (Supp. IV 1977).[5] There, Congress has provided that the Council "shall have no authority" to "impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District". They contend that the tax now imposed by virtue of repeal of the exemption contained in Section 47-1574 amount to a tax on their personal income. This Court cannot agree.

Section 47-1574 imposes a franchise tax on unincorporated businesses for the "privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District". *See* Sections 47-1571a, 47-1574b. The above language used by Congress in imposing the tax is unambiguous and is consistent with the legislative history of the tax. *See* H.R. Rep. No. 543, 80th Cong., 1st Sess. 3-4 (1947).

No court in this jurisdiction has decided the issue presented here, that is, whether the tax is an income tax or a franchise tax. The question was raised in *Gardella* v. *Comptroller of Maryland,* 130 A.2d 752 (Md. 1957), where the taxpayers, who were residents of Maryland and paid income taxes to that state; attempted to deduct from their state income tax the amount of their unincorporated business franchise tax paid to the District of Columbia pursuant to Sections 47-1574 *et seq.* In a persuasive Opinion, the Maryland Court of Appeals ruled that the tax was a true franchise tax and not an income tax and therefore not

[5] See the Self-Government and Government Reorganization Act, Pub. L. 93-198, § 602, 87 Stat. 774.

deductible from the Maryland income tax. That court noted that the tax was imposed for the privilege of doing business and receiving income from sources within the District of Columbia and placed upon the unincorporated entity and not upon the individuals composing that entity. Itd. at 753-754.

Petitioners cite *Commissioner* v. *American Metal Co.*, 221 F.2d 134 (2d Cir. 1955) and *New York & Honduras Rosario Mining Co.* v. *Commissioner,* 168 F.2d 745 (2d Cir. 1948) as supportive of their argument, however, each case must be judged upon its own peculiar facts. In *American Metal Co.* the court held that the tax challenged in that case was an excise tax noting that the tax attached when the ore was extracted regardless of whether it was thereafter transported or sold. 221 F.2d at 137. In *New York & Honduras Rosario Mining Co.,* the same court had earlier ruled that another tax was an income tax and not an excise tax because it was the substantial equivalent of an income tax as that tax was understood in the United States. It was significant in that case that the tax imposed by Honduras was the equivalent of an income tax in this country and that Honduras, in addition to the "income tax", imposed genuine excise taxes for the privilege of mining. 168 F.2d at 748. In *Keasbey & Mattison Co.* v. *Rothensies,* 133 F.2d 894 (3d Cir. 1943), the court concluded that a tax imposed by the Province of Quebec, Canada, was in reality an excise tax since it was imposed upon the privilege of mining as measured on the basis of gross value. That court found the tax to fall within the "accepted standards of an excise tax" and felt it significant that the "allowable deductions are restricted to the cost actually incurred in the mining operation and nothing more". 133 F.2d at 898.

Such cases as those briefly discussed can only suggest guidelines which this Court should follow in deciding the issue. As noted above, the Opinion in *Gardella* is persua-

sive. Moreover, the unincorporated business tax is imposed in addition to any income tax the taxpayer may be compelled to pay. Congress has provided that the tax is imposed for the privilege of carrying on or engaging in any trade or business and of receiving income from sources in the District. The fact that the tax is measured based upon the taxable income makes it no less a franchise tax. Furthermore, unlike an income tax, a minimum tax is payable regardless of whether there is taxable income. *See* Section 47-1574b. For all of the above reasons, this Court concludes that the tax imposed by Section 47-1574 is a franchise tax as opposed to an income tax.

Petitioners argue that Section 1-147(a)(5) prohibits the Council from enacting not just an income tax on nonresidents but any tax which is derived from the nonresidents personal income. This Court interprets the term "tax on the whole or any portion of the personal income" as set forth in Section 1-147(a)(5) to mean a personal income tax as that term is commonly used. That interpretation is consistent with the Legislative History of the Self-Government and Governmental Reorganization Act. See H.R. Rep. No. 93-482, 93d Cong., 1st Sess. (1973).

These petitioners also overlook the fact that the exemption was merely granted by way of legislative grace and that the tax itself was imposed not by the Council of the District of Columbia but by the Congress of the United States.

This Court finds nothing in the Self-Government and Governmental Reorganization Act which would prohibit the Council from repealing the exemption granted petitioners under Section 47-1574. The Court holds that the tax is a franchise tax and not an income tax and that Section 1-147(a)(5) merely prohibits the Council from enacting a personal income tax on nonresidents.

IV

The petitioners argue that the tax as imposed upon them violates both the Privileges and Immunities Clause of U.S. Const., Art. IV, § 2, C. 1 and the equal protection provisions of U.S. Const., Amend. XIV as well. The equal protection provision of the Constitution applies to citizens of the District of Columbia by virtue of the due process provisions of the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Their claim is based on the fact that a resident unincorporated business has the right to deduct a portion of the franchise tax from its District of Columbia income tax returns. See D. C. Code 1973, § 47-1557a(b)(10). A nonresident has no such privilege in the District of Columbia simply for the reason that the nonresident is not required to pay an income tax in the District.

Petitioners place heavy reliance on two cases, namely, *Austin* v. *New Hampshire,* 420 U.S. 656 (1975) and *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920). In *Austin,* the State of New Hampshire imposed a commuter tax on all nonresidents earning income in New Hampshire. That state also imposed a commuter tax on income earned by its residents working in another state but exempted such income from the tax if that income was taxed by the state where earned, if it was exempted by the state where earned, or if the state where it was earned had no tax on income. 420 U.S. at 658. The practical effect insofar as New Hampshire residents were concerned was that they paid no commuter tax to that state. The Supreme Court found that the tax was unconstitutional under the Privileges and Immunities Clause since the overall result was that the tax fell exclusively on the income of nonresidents. 420 U.S. at 665. In *Travis,* the discrimination against nonresidents was perhaps even more blatant. There New York imposed a tax on both residents and nonresidents but granted residents an exemption on the first $1,000 or $2,000 of income, depending upon their circumstances, while

denying a like exemption to nonresidents of that state. That tax was held to be in violation of the Constitution in that it resulted in an unwarranted discrimination against nonresidents who worked side by side with residents of New York. That case was distinguished from *Shaffer* v. *Carter,* 252 U.S. 37 (1920) where the "nonresident was not treated more onerously than the resident". 420 U.S. at 664. *See also Travellers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902).

The facts in the instant case are clearly distinguishable. Here the tax is imposed equally on both the resident and the nonresident alike and both are entitled to the same exemptions and deductions insofar as the franchise tax is concerned. The only distinction is that a resident is entitled to take a deduction from his District of Columbia income tax return while of course, nonresidents are required to pay no such tax. The fact that a resident may deduct the amount paid for the franchise tax from his local income tax return does not make the tax unconstitutional under any of the cases cited by the petitioners. Petitioners are correct when they argue that the fact that Maryland or Virgnnia could perhaps make the tax more equitable by allowing them to deduct the franchise tax from their respective state taxes, *Gardella* v. *Comptroller of Maryland, supra,* would not save the local tax from a constitutional challenge. *See Austin* v. *New Hampshire, supra* at 666-668. However, this Court finds that the franchise tax as imposed under the District of Columbia of Code affords equal treatment to both the resident and nonresident and does not violate the Privileges and Immunities Clause or the Equal Protection Clause of the Constitution.

V

The petitioners have made several other arguments but this Court finds those arguments to be totally without merit

and they need not be discussed. Since these petitioners do not seek a refund on the grounds that the amount of the tax imposed was excessive, it follows that the Court's action denying their request for, what amounts to declaratory relief, is dispositive of all issues.

ORDER

It is hereby

ORDERED that petitioners request for refund is denied and it is further

ORDERED that these Petitions are dismissed with prejudice.[6]

/s/ JOHN GARRETT PENN
Judge

Dated: October 18, 1977

[6] Separate Judgment Orders shall be entered in each case.

APPENDIX E

Section 602(a)(5) of the District of Columbia Self-Government and Governmental Reorganization Act (Self-Government Act), 87 Stat. 813, D. C. Code § 1-147(a)(5) (Supp. V, 1978), provides:

> The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to—
>
> * * *
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of title I of the District of Columbia Income and Franchise Tax Act of 1947) * * *.

Section 1 of Title XIII of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 345-346, as amended by 85 Stat 582, D. C. Code, 1973, § 47-1574, provides:

> For the purposes of this article (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" mean any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee, assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation

would be taxable under title VII of this article. * * *

* * *

* * * "The words 'unincorporated business' do not include any trade or business which by law, customs, or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under the District of Columbia Professional Corporation Act, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor."

Section 1 of Title X of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 349, D. C. Code, 1973, § 47-1580, provides:

It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however,* That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in

within the District and such other net income as is derived from sources within the District.

Section 605 of the District of Columbia Revenue Act of 1975, D. C. Law 1-23, 22 D. C. Register 2113, D. C. Code, § 47-1574 (Supp. V, 1978), provides:

Section 1 of Title VIII of the District of Columbia Income and Franchise Tax Act of 1947 (D. C. Code, sec. 47-1574) is hereby amended by striking the following sentence:

"The words 'unincorporated business' do not include any trade or business which by law, customs or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under the District of Columbia Professional Corporation Act, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor."

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENT KLEIBOEMER IN OPPOSITION

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No. 79-1568

DISTRICT OF COLUMBIA,
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RICHARD A. BISHOP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENT KLEIBOEMER IN OPPOSITION

Respondent Axel-Felix Kleiboemer, individually, and on behalf of the taxpayer class, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the en banc judgment of the District of Columbia Court of Appeals.

QUESTION PRESENTED

Whether Section 605 of the District of Columbia Revenue Act of 1975 which imposes a tax measured by

net income on nonresident professionals and nonresident owners of personal service businesses is violative of Section 602(a)(5) of the District of Columbia Self-Government and Governmental Reorganization Act which prohibits the District of Columbia City Council from imposing any tax on the personal income of nonresidents.

STATEMENT

By its petition, the District of Columbia seeks to have this Court review an en banc judgment of the District of Columbia Court of Appeals construing a local tax statute. In a 9-1 opinion issued February 12, 1980, following en banc rehearing at the District's request, the Court of Appeals affirmed an earlier holding by a three-judge division of the Court [1] that Section 605 of the District of Columbia Revenue Act of 1975 [2] —which repealed the exemption from taxation of professionals and owners of unincorporated personal service businesses under the District of Columbia unincorporated business tax [3]—imposed a tax on the personal

[1] *Bishop* v. *District of Columbia*, D.C. App., 401 A.2d 955 (1979).

[2] The District of Columbia Revenue Act of 1975 was enacted on October 21, 1975, as D.C. Law No. 1-23.

[3] District of Columbia Income and Franchise Tax Act of 1947, Pub. L. 80-195, 61 Stat. 328 *et seq.*, D.C. Code, 1973, § 47-1551 *et seq.* By its terms the 1947 Act imposed an "income tax" on the net income of District residents and a "franchise tax" measured by District source net income on the income of corporations and unincorporated businesses conducted in the District. Congress specifically exempted, however, two categories of unincorporated businesses from the tax: (1) those which "by law, customs or ethics cannot be incorporated" (professionals); and (2) those "in which more than 80 per centum of the gross income is derived from • • • personal services • • • and in which capital is not a material-income producing factor." 61 Stat. 345-346, D.C. Code, 1973, § 47-1574 ("professional exemption").

income of nonresidents in violation of the Congressional limitation on the taxing authority of the District of Columbia City Council set forth in § 602(a)(5) of the Home Rule Act.[4]

The applicable provision of the Home Rule Act states that "[t]he Council shall have no authority to * * * (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District * * * *" D.C. Code § 1-147(a)(5) (Supp. V, 1978).

In March 1975 the District of Columbia City Council Finance and Revenue Committee noticed hearings on the Mayor's Fiscal 1976 Budget and solicited comments. The announcement provided notice to the affected taxpayers of a proposed gross receipts tax on all local businesses. The Mayor's Budget contained no proposal for the removal of the long-standing professional exemption from the 1947 District of Columbia unincorporated business tax.[5] Following the hearings, the Committee issued its report, recommending adoption of the Mayor's gross receipts tax proposal and further recommending retention of the 1947 professional exemption.[6] Shortly thereafter, retailers who opposed the gross receipts measure urged the City Council to remove the professional exemption.[7] Less than

[4] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), codified at D.C. Code §§ 1-121 to -171 (Supp. V, 1978) ("Home Rule Act").

[5] Hearings on the District of Columbia Revenue Act of 1975 before the Senate Committee on the District of Columbia, 94th Cong., 1st Sess., Part I, 128-137, 331, 356-364.

[6] *Id.* at 301-302, 331.

[7] *Id.* at 131.

forty days later, with no further notice or public hearings,[8] the City Council passed the tax at issue.[9]

On December 12, 1975, before the first payment of the tax was due, suit was filed in the Superior Court of the District of Columbia contesting the legality of the tax and seeking injunctive relief. After a full record was developed on the merits, the case was dismissed because of the District's anti-tax injunction statute. D.C. Code, 1973, § 47-2410. Prior to dismissal, respondents Kleiboemer and Bishop initiated separate refund actions in the Superior Court alleging grounds of illegality substantially identical to those set forth in the injunctive suit.[10]

[8] *Id.* at 131-132.

[9] The tax is determined by calculating the net income of the unincorporated business, allowing for a deduction of all ordinary and necessary business expenses. From the net income is deducted a "salary allowance" of 70% of the net income and a $2500 exemption. The tax is then imposed on the balance—30% of net income less the $2500 exemption—at a present rate of 9.9% (Pet. 32a-33a at n. 18).

Resident owners of unincorporated businesses have that portion of their income which has been taxed under the unincorporated business tax, *i.e.*, approximately 30%, *excluded* from their gross income for purposes of the District of Columbia individual income tax. D.C. Code, 1973, § 47-1557a(a)(10). No such exclusion is available to nonresidents because they pay individual income tax to their states of residence and not to the District.

Because of this exclusion, hypothetical partners in a two-man law firm, one a resident of the District, the other a resident of Virginia, dividing $100,000 firm net income equally, bear the burden of the tax unequally. The nonresident's share of the unincorporated business tax is $1,361.25, which he must pay *in addition* to his Virginia income tax. The D.C. resident also pays a $1,361.25 share of the new tax, but because of the differential in the 9.9% rate for the new tax and 11% rate for the personal income tax, his individual income tax is *reduced* by $1,512.50, an *actual net reduction* of $151.25 in total District taxes based on income.

The trial judge initially denied respondents' claims. Thereafter, he filed a supplemental opinion holding the tax unconstitutional in part because it imposed the tax unequally on calendar-year and fiscal-year taxpayers. The District was ordered to refund all taxes collected for the period prior to December 1, 1975. (The tax was formally adopted into law in October 1975, but made retroactive to January 1, 1975.) Respondents appealed that part of the judgment which rejected their overall attack on the legality of the tax, and the District cross-appealed the calendar-fiscal-year ruling.

The Court of Appeals division opinion issued on April 20, 1979, recognized that the issue is whether the City Council's action in repealing the professional exemption of the 1947 Act imposes "a tax on the personal income of nonresidents or whether the tax is levied on something other than income (*e.g.*, the privilege of doing business in the District)." (Pet. 22a.)

In a carefully crafted opinion the Court held that "the D.C. unincorporated business tax is an income tax." (Pet. 22a-30a.) The Court reasoned:

> The professional tax, by its very terms, is a tax on net income. D.C. Code 1973, § 47-1547a defines taxable income, for purposes of the tax on unincorporated businesses, as "the amount of *net income* derived from sources within the District . . . in excess of the exemption granted by section 47-

[10] The two refund suits were consolidated for trial. Respondent Kleiboemer's suit was certified as a class action on behalf of all nonresidents subject to the tax and who paid the tax, except for respondent Bishop (Pet. 20a).

1574c (emphasis added)." Net income is defined in D.C. Code 1973 and 1978 Supp., §§ 47-1557 to -1557b. (Pet. 31a.)

The en banc opinion of the Court of Appeals, issued February 12, 1980, affirms the division's statutory construction of the tax:

> The arguments advanced by the government in the en banc rehearing of this case do not persuade this court to disturb the division's holding in *Bishop* v. *District of Columbia*, D.C.App., 401 A. 2d 955 (1979), that Section 605 of the Revenue Act of 1975 was an impermissible exercise of the District of Columbia Council's authority under § 602(a)(5) of the Home Rule Act. (Pet. 2a.) (Footnotes omitted.)

This petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

This Court has made clear it will not review judgments of the District of Columbia Court of Appeals on matters of purely statutory interpretation of local law unless the case involves an "exceptional" situation where "egregious error has been committed." *Pernell* v. *Southall Realty*, 416 U.S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U.S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U.S. 463, 476 (1946). This practice of deference to decisions of the District of Columbia Court of Appeals on matters of exclusively local concern was recently reaffirmed by this Court in *Whalen* v. *United States*, No. 78-5471, decided April 16, 1980, 48 U.S.L.W. 4406. Measured by this standard, the decision here presents no reason why this Court should exercise its extraordinary and discretionary jurisdiction. As we show, the case is

neither "exceptional" nor does it contain "egregious error."

I

The District argues (Pet. II, 9-14) that the plain meaning of § 602(a)(5) of the Home Rule Act and settled principles of statutory construction establish that the tax in question is a franchise tax and not an income tax." This argument simply disagrees with the holding of the Court of Appeals; it in no way demonstrates that the Court committed "egregious error" under *Pernell* and *Whalen*.

In ruling the tax invalid, the Court of Appeals applied long-standing principles of analysis of tax statutes articulated by this Court. The Court looked to the "nature and effect of [the] . . . tax, not its label" (Pet. 27a), citing *Dawson* v. *Kentucky Distilleries*, 255 U.S. 288, 292 (1921). Further, the Court recognized that while not controlling, the legislative designation of the character of the tax "is entitled to much weight" (Pet. 27a), citing *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1910). Upon analysis of the substance of the City Council's removal of the 1947 exemption, the Court properly found that "the nature and effect" of the action was to impose a tax on personal income.[12]

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[11] This in our view is the District's principal argument; accordingly, we treat it first.

[12] Under *Dawson*, an examination of the "incidents" of the tax demonstrates that its essential character is a levy on income and not a tax for the privilege of doing business. As pointed out *supra* n. 9, the tax is measured solely by net taxable income. Although purporting to tax the unincorporated entity, the statute makes clear that the burden of the tax is to fall *personally* upon those individuals receiving income solely by virtue of the personal services they perform. D.C. Code, 1973, § 47-1574d. Moreover, the

Contrary to the District's petition at 10-13, the Court of Appeals did not ignore the argument that because of the specific reference in § 602(a)(5) of the Home Rule Act that the terms "individual" and "resident" were to be understood as defined in "the District of Columbia Income and Franchise Tax Act of 1947," Congress intended to incorporate into the section the "conceptual distinctions" between personal income and franchise taxes set forth in the 1947 Act. The reference, however, has to be considered in the context of the overall background of the 1947 Act and the enactment of § 602(a)(5).

As indicated *supra* n. 3, the 1947 unincorporated business tax was imposed solely on capital intensive unincorporated businesses, expressly excluding professionals and personal service businesses. Beginning in 1967 the District on numerous occasions sought Congressional authorization to impose a commuter tax on the personal income of nonresidents, including the nonresident income exempted from the 1947 unincorporated business tax. Congress repeatedly rejected these proposals, primarily because the tax mechanism by which neighboring states allow residents a direct credit against their state income taxes would place the burden of a District commuter tax on all residents of Maryland and Virginia and not only on those who worked in the District. *See, e.g.*, District of Columbia Appro-

resident's share of the income of the unincorporated business subject to the tax is excluded from his gross income, and consequently is *excluded* from taxation under the District's individual income tax. If indeed, as the District contends, the tax were a true "franchise" tax for the privilege of deriving income from the conduct of an unincorporated business in the District, it would be applied equally to all who conduct such an enterprise regardless of the individual's residence.

priations: Hearings before the House Subcommittee on Appropriations, 92nd Cong., 1st Sess., Part I, 18 (1971). (Statement of Senator Eagleton.)

The professional exemption under the 1947 Act was considered by Congress in 1971 when it passed the District of Columbia Professional Corporation Act, Pub. L. 92-180, 85 Stat. 576, which gave professionals practicing in the District of Columbia the right to incorporate. Because one basis for exclusion from taxation under the 1947 Act was that professionals "by law, customs or ethics [could not] be incorporated," the District argued to Congress that if professionals were allowed corporate status, it logically would follow that the 1947 exemption should be removed. Congress refused to do so because such removal would impose a "commuter" tax on "one group of taxpayers." [13] And, as the Court of Appeals documented, there is no doubt that Congress intended to prohibit a "commuter" tax (as well as any tax "which is based on a percentage of income") in barring the City Council from imposing any tax directly or indirectly on the personal income of nonresidents. (Pet. 3a-4a, 24a-25a.)

Considering the broad prohibitive language of § 602(a)(5) and the unambiguous intent of Congress in its enactment, together with Congress' 1971 equation of removal of the 1947 exemption to a "commuter" tax, the Court of Appeals correctly rejected the District's "antecedent enactment" argument.[14]

[13] H.R. Rep. No. 92-508, 92nd Cong., 1st Sess. 4. Indeed, Congress amended the 1947 Act to make clear the exemption was being maintained even though professionals could incorporate. 85 Stat. 582.

[14] The Court of Appeals also correctly rejected the District's argument (Pet. 11-12) that Congress' failure in 1975 to exercise

Finally, the Court of Appeals decision does not, as the District argues (Pet. 14), preclude the District from imposing any franchise tax on nonresident professionals who operate their businesses within the District's borders. As the Court emphasized, the opinion holds "only that the District of Columbia cannot tax the net personal income of nonresidents." (Pet. 33a.) Any "inequities" or "inconsistencies" flowing from the District's inability to tax net personal income of nonresidents are fundamentally questions of tax policy. It is the Congress—and not this Court—to which the District of Columbia must turn for consideration.

In sum, the District of Columbia Court of Appeals division and en banc opinions engaged in a careful and thoughtful analysis of the tax statute in question and in ruling it unlawful, reached a conclusion that is defensible and free from "egregious error."

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its right under D.C. Code § 1-147(c) (Supp. V, 1978) to disapprove the City Council's removal of the 1947 exemption is strong evidence that the Council did not exceed its authority under the 1973 Home Rule Act. First, as this Court has held, in interpreting a statute, mere inaction by a subsequent Congress is ambiguous at best and "affords the most dubious foundation for drawing positive inferences." *United States* v. *Price*, 361 U.S. 304, 310-311 (1960). Second, a disapproval resolution was voted down in the House District of Columbia Committee and thus neither the House nor the Senate actually considered the measure. Moreover, the District's Congressional supporters recognized that the tax presented a "close legal question," one which should be resolved by a "court of competent jurisdiction." Hearings on the District of Columbia Revenue Act of 1975 before the Subcommittee on Fiscal Affairs of the House Committee on the District of Columbia, 94th Cong., 1st Sess. 180. (Statement of Congressman Dellums.)

II

None of the sundry arguments advanced by the District at pages 6-9 of its petition individually or collectively warrant certiorari in this case.

The decision does not, as the District argues, "reimpose" on Congress legislative functions that Congress delegated to the District. To the contrary, the decision holds that the action of the City Council in enacting this tax was *beyond* the authority delegated and thus unlawful. The decision does nothing more than reserve to Congress that which Congress expressly sought to reserve in its limited delegation of taxing authority to the Council.

The District complains that the Court of Appeals decision creates a "gaping hole" in the local franchise tax structure and generates an inequitable distribution of tax. But, by invalidating the tax, the decision simply restored the tax to the status which Congress itself created in 1947 and which Congress continued to maintain up until the City Council's action. Simply put, the so-called "gaping hole" is one which Congress—and not the Court—created on the basis of various reasons of tax policy properly within its ultimate domain.

Obviously, as the District stresses, the invalidated taxes are substantial and important to the District's general fiscal stability. Under *Pernell* and *Whalen*, however, this, standing alone, does not provide any basis for the Court to exercise its certiorari jurisdiction in what is a strictly local matter.[15]

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[15] The District (Pet. 6) relies on *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961), and *Territory of Alaska* v. *American Can Co.*, 358 U.S. 224 (1959), to support its claim that a matter of "fiscal importance" is sufficient to warrant certiorari review. Such reli-

Finally, the decision of the Court of Appeals involves no issue of national or federal significance.[16] The District argues (Pet. 8-9) that because the tax is imposed on professionals throughout the nation who practice in the District, the case extends beyond the

ance is misplaced. *Arctic Maid* involved a federal court of appeals decision that the tax at issue was constitutionally forbidden by the commerce clause. *American Can* involved tax liability of individuals under a territorial tax which the Ninth Circuit ruled did not survive repeal of the tax. This Court granted certiorari in 1958 *before* Alaska became a state. Thus, unlike the case here, *American Can* did not involve a ruling by the "highest court of a State" for purposes of 28 U.S.C. 1257(3). Moreover, *American Can* must be viewed in the context of this Court's express limitations in *Pernell* and *Whalen* that review of District of Columbia Court of Appeals decisions is appropriate *only* where there is *egregious error*, which is surely not the case here.

[16] Unlike the cases cited by the District (Pet. 6), the decision here is not enmeshed with any constitutional issues, nor does it affect in any way federal revenues or other federal interests. Compare *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953) [whether under Article I, section 8, clause 17 of the Constitution Congress could delegate to the District the power to enact laws forbidding racial discrimination by local restaurant operators]; *Shuttle Corp.* v. *Transit Comm'n*, 393 U.S. 186 (1968) [conflict between local transit commission and exclusive power of Secretary of Interior over the federal Mall]; *District of Columbia* v. *Murphy*, 314 U.S. 441 (1941), and *District of Columbia* v. *Pace*, 320 U.S. 698 (1944) [impact of local tax laws on persons residing in the District because of their federal employment]; *Commissioner* v. *Standard Life & Acc. Ins. Co.*, 433 U.S. 148 (1977) [split in circuit courts of appeals concerning treatment of federal taxing laws].

Respondents argued below that the tax unconstitutionally discriminated between residents and nonresidents. Also, as indicated, the trial judge ruled the tax unconstitutional in part. But, in view of its holding, the Court of Appeals did not reach these issues. (Pet. 33a.)

"shores of the Potomac." [17] This substantially misconstrues the operation of the tax. The tax is imposed only on the *local source* revenue of professionals and others, *irrespective* of their residency or other bases of operation. Further, because the decision invalidated the tax, no taxpayer outside the District—or within—will pay the challenged tax if the decision stands.

Similarly, the "interjurisdictional" conflict (Pet. 9) between the decisions of the courts of Maryland and Virginia is fictional. The purported conflict would come into play *only* if the tax had been declared lawful, thus forcing Virginia and Maryland individuals who paid the tax to apply to their respective states for a tax credit.

In sum, certiorari review is inappropriate because the case is free from "egregious error" under *Pernell* and *Whalen*, and the impact of the decision is limited solely to the District of Columbia without any national or federal implications.

[17] *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556 (1956).

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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RESPONDENT BISHOP'S BRIEF IN OPPOSITION

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DISTRICT OF COLUMBIA,
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Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

RESPONDENT BISHOP'S BRIEF IN OPPOSITION

Respondent, Richard A. Bishop, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the District of Columbia Court of Appeals in this case—a case in which the full court, by a vote of nine to one after rehearing the case en banc, upheld the unanimous decision of the three judge division of the court which first ruled for the respondent.

JURISDICTION

The petitioner cites 28 U.S.C. § 1257(3) and relies upon a lengthy textual footnote (p. 5, n. 2) to support its invocation of this Court's certiorari jurisdiction.

Its jurisdictional assertion presupposes the applicability of a law "of the United States," as does the jurisdictional footnote in which it contends that the District of Columbia Self-Government and Governmental Reorganization Act (Self-Government Act) is such a law. This Court, however, has specifically held "that a law applicable only in the District of Columbia is not a 'statute of the United States' . . . ." *Key* v. *Doyle,* 434 U.S. 59, 61 (1977). *Accord, United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140 (1915); *American Security & Trust Co.* v. *Commissioners of the District of Columbia,* 224 U.S. 491 (1912).

The two cases cited by the petitioner do not alter the distinction which this Court has made between laws of local application and laws of genuine national scope. As its name suggests, *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821), involved a conflict between an Act of Congress and the laws of a state, a situation which is not present here. *Id.* at 359-65. And *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), simply did not involve the character of any statute, but rather the constitutional status of certain courts. The respondent, accordingly, submits that the petition should be dismissed for want of jurisdiction. However, recognizing the broad discretion of this Court in reviewing petitions for writs of certiorari, the respondent submits that the petition should, in any event, be denied for the reasons stated below.

QUESTION PRESENTED

Assuming jurisdiction, the question presented is not one of "broadly delegated . . . constitutional power," as the petitioner asserts (p. 2), but whether the petitioner's imposition of its unincorporated business tax on the respondent's income from the performance of personal services violates the specific prohibition, deliberately enacted by Congress in the Self-Government Act (Petitioner's App. at 55a), that—

> [t]he Council shall have no authority to . . . impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

REASONS FOR DENYING THE WRIT

The petitioner advances three basic reasons this Court should grant its request for a writ of certiorari—(1) that the case has major fiscal significance (p. 6, n. 3), (2) that the decision below severely restricts the congressional grant of self-government to the District, imposing on Congress duties Congress sought to delegate (p. 7), and (3) that the decision below violates principles of statutory construction by misconstruing the Self-Government Act (p. 10).

The petitioner's reasons fail to support its petition for review. Indeed, an examination of those reasons, by focusing upon the very thorough review that this case has already received, confirms that the writ of certiorari should be denied.

1. The Fiscal Significance of This Case Is Purely Local and Therefore Fails to Justify Review by This Court.

The respondent does not dispute the fiscal significance of this case, particularly to the taxpayers involved, or the financial loss to the District of Columbia government if it is required to refund the taxes which

the District's highest court, after two hearings, has held to have been illegally collected. The respondent simply points out the obvious—that in the petitioner's own words (p. 6, n. 3) this case involves a "revenue loss to the District" and not a federal issue of national importance.

From the fact that the courts of Maryland and Virginia have had occasion to consider the same District of Columbia tax that is in issue here, the petitioner (p. 9) vainly seeks to create "interjurisdictional importance." As the petitioner admits, the inquiry of those state courts has been whether to grant taxpayers a credit under the laws of those states for the unincorporated business tax paid to the District. Since the District of Columbia Court of Appeals has now held that the respondent cannot be made to pay the tax in the first instance, his possible right to a credit can no longer have any "importance" for Maryland and Virginia. Moreover, the interjurisdictional importance of this case can hardly be created by the refusal of the District's highest court (1) to validate a law that would result in double taxation of the income of nonresidents performing personal services in the District, and (2) to approve a new statutory scheme which would place a disproportionately large share of the burden of a new tax upon nonresidents by allowing District residents subject to the new tax to exclude their income subject to the new tax from their income subject to the District's individual income tax. Thus, the respondent submits that (1) the case was correctly decided by the highest local court in a manner which *avoids* interjurisdictional conflict and (2) in its present posture the case presents no substantial federal question.

Every example of this Court's review of District of Columbia cases cited by the petitioner (p. 6) is readily distinguishable. Those cases all arose before enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, and involved the vindication and clarification of strong federal interests—in racial equality, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953); in the authority of the Secretary of the Interior, *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968); and in the prevention of "triple taxation" of federal employees, *District of Columbia* v. *Murphy*, 314 U.S. 441, 452 (1941), and *District of Columbia* v. *Pace*, 320 U.S. 698 (1944). Moreover, contrary to the inference drawn by the petitioner, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern . . . ." *Pernell* v. *Southall Realty*, 416 U.S. 363, 366 (1974).

Even before the 1970 Court Reform Act, the Court said: "We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District." *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556 (1965). *Accord, Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944) (per curiam); *District of Columbia* v. *Pace, supra* at 702; *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935); *United Surety Co.* v. *American Fruit Product Co., supra; American Security & Trust Co.* v. *Commissioners of the District of Columbia, supra.* It is true that such pronouncements appear as dicta (in cases characterized by an overriding federal

issue, unlike the case here), but that is the only way a policy *not* to review cases *can* be expressed. In addition, this Court's reluctance to review such local cases is reinforced by the 1970 Court Reform Act, which was intended "to establish an entirely new court system . . . with responsibility for trying and deciding those distinctively local controversies that arise under local law . . . ." *Key* v. *Doyle, supra* at 67; *Palmore* v. *United States,* 411 U.S. 389, 409 (1973).

The present case is a "distinctively local controversy." The petitioner (p. 8) cites two cases in which this Court has reviewed decisions of lower *federal* courts that limited the application of certain Alaskan taxes. *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961); *Territory of Alaska* v. *American Can Co.,* 358 U.S. 224 (1959). But in the present case a District tax on income earned in the District has been held invalid by the highest court of the District, and by a solid 9-to-1 vote of the judges sitting en banc. To the extent that the petitioner feels restricted in its ability to raise revenue, the respondent submits that it must plead its cause to Congress, not to this Court. There is no purpose, and certainly not the purpose of "self-government" which the petitioner cites, to be served by this Court's review of such an unequivocal local resolution of a local matter.

2. The Decision Below Was Required by the Self-Government Act. That Decision Neither Restricts the Grant of Self-Government Nor Imposes on Congress Duties Congress Sought to Delegate.

The petitioner complains (p. 7) that "[t]he decision of the Court of Appeals results in a serious depreviation [sic] of self-government and a reimposition on

Congress of legislative functions that Congress delegated to the District." This theme, repeated throughout the petition, begs the question. It is simply an assertion that the lower court's decision should be reviewed because the petitioner disagrees with it, hardly a ground for issuing a writ of certiorari.

The petitioner has never contended that in the Self-Government Act Congress delegated to the District Council *all* taxing power, or that Congress failed to reserve *any* taxing power. In the Appendix to its petition (p. 55a), the petitioner sets forth the clear declaration by Congress that—

> [t]he Council shall have no authority to . . . impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

The highest court of the District found the tax in question by its plain language and its legislative history to be just such a tax. As a result, that court properly invalidated the tax. The court did no disservice to Congress by "return[ing] to it the burden of legislating on matters logically within the grant of self-government . . ." (p. 7), because Congress itself expressly and deliberately retained that "burden."

The petitioner makes the same mistake by stating (p. 6, n. 3) that "[t]he decision also places a cloud over the District's authority to impose in the years ahead any tax, measured by net income, on this class of taxpayers under the Self-Government Act." This is true, but because Congress itself limited the District's authority to impose "any tax" on the personal income of nonresidents, which unquestionably embraces "this class of taxpayers," including the respondent. Similarly,

in seeking to establish the importance of this case, the petitioner complains (p. 7, n. 4) that "the tax base of the District is extremely narrow," citing the same congressional prohibition.

In short, the petitioner advances the proposition that the very existence of the congressional prohibition is cause enough for its scope to be reviewed by this Court. This argument fails to justify issuance of a writ of certiorari.

3. The Self-Government Act Was Correctly Construed Below.

The petitioner asserts (p. 9) that the District of Columbia Court of Appeals "contravened [the] plain meaning [of the Self-Government Act] and violated settled principles of statutory construction long recognized by this Court," and charges (p. 10) that the court "ignored critical words" of the Self-Government Act. The petitioner then proceeds to misquote that Act by omitting the critical word "any" in the congressional prohibition of "*any* tax on the whole or *any* portion of the personal income . . . of *any* individual not a resident of the District . . . ." D. C. Code § 1-147 (a)(5) (Supp. V, 1978) (emphasis added). *Compare* Petition at 10 *with* App. at 55a. In fact, the court below violated no principle of construction by recognizing that this language is very broad.

The petitioner, however, insists (p. 10) that this broad prohibition "plainly does not prevent the District from imposing a *franchise tax* on unincorporated *business entities* for the privilege of doing business in the District." But the test of the prohibition is not what the tax is called, or what it is "for," but what it is "on." And the unincorporated business tax in question here is "levied . . . upon . . . income." D.C. Code

§ 47-1574b (Supp. V, 1978). The court below violated no principle of construction by recognizing that the prohibition of "any" such tax prohibits imposition of the tax in question here. Thus, it is the petitioner which has ignored "settled principles of statutory construction" by its respect for form over substance and its preoccupation with the label that was given the unincorporated business tax when it was first enacted in 1947. The controlling principle is that "[t]he name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents . . . ." *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1921). This is the test which was applied by the court below. *See* Petitioner's App. at 27a-32a.

Consistent with this principle, in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458-62 (1959), this Court reviewed a number of precedents involving "income," "franchise," and "privilege" taxes—all based on net income. Disregarding labels, this Court stated that all of the precedents "involv[ed] income levies by States." *Id.* at 461. Similarly, in *General Motors Corp.* v. *District of Columbia*, *supra* at 559-61, this Court freely likened the District's corporate "franchise" tax (part of the same 1947 tax statute which the petitioner claims gave the unincorporated business "franchise" tax its character) to "corporate income taxes," "state taxes imposed on income," and a "state income tax," and finally, in *Complete Auto Transit, Inc.* v. *Brady*, 435 U.S. 274 (1977), this Court stated:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that

> formalism merely obscures the question *whether the tax produces a forbidden effect. Id.* at 288 (emphasis added).

That was the precise question raised and answered by the court below. *See* Petitioner's App. at 29a-32a.

Again, the petitioner (p. 12) cites "over 30 years of congressionally established taxing distinctions" and complains that the court below "sets forth no congressional pronouncement which spells out an intent to reconstitute the franchise tax as a tax on personal income . . . ." The reason for this, of course, is that the petitioner has never set forth any congressional pronouncement which spells out an intent that the franchise tax *not* be treated as a tax on personal income from the beginning, contrary to the impression that the petitioner may have created by its misleading and unjustified insertion of the word "personal" into its paraphrase of the 1947 legislation in its statement of the case. *Compare* Petition at 3 *with* App. at 56a. The petitioner relies only on the label of the tax. The court below correctly recognized that a tax labelled a franchise tax can in substance be considered any number of types of tax (including a tax on personal income), "depending on the incidents of taxation" (Petitioner's App. at 27a), and analyzed this case accordingly. Moreover, when Congress enacted this "franchise tax," it expressly excluded personal service income from the tax base. *See* Petitioner's App. at 56a.

Finally, the petitioner (p. 13) asserts that the congressional prohibition "was aimed at the 'commuter' and 'reciprocal' income tax proposals made by the District prior to enactment of the Self-Government Act." It states that Senator Eagleton, the principal

Senate sponsor of the Self-Government Act, distinguished "between an across-the-board tax on the personal income of nonresidents and the business franchise taxation involved here . . . ." That distinction is obvious (although not from Senator Eagleton's cited remarks), but the fact remains that the respondent's personal service income would have been taxed under the proposed "commuter" and "reciprocal" income taxes, just as it has been taxed by reason of the petitioner's illegal action here.

The court below correctly recognized that the petitioner's attempt to tax the respondent's income is no less repugnant to the congressional prohibition merely because *some* nonresidents are selected as the target. This holding was compelled by the Self-Government Act, which prohibits, not only an "across-the-board" tax on *all* income of *all* nonresidents, but "*any* tax on the whole or *any* portion of the personal income . . . of *any*" nonresident. D. C. Code § 1-147(a)(5) (Supp. V, 1978), Petitioner's App. at 55a (emphasis added). Senator Eagleton himself described this provision as "a specific prohibition as to the imposition of a commuter tax, a reciprocal income tax, *or any other tax* on nonresidents of the District of Columbia." 117 CONG. REC. 42498 (1971) (emphasis added). Similarly, Representative Gude, the House sponsor of the prohibition, confirmed that it would preclude "any tax which is based on a percentage of income regardless of whether it is technically considered personal income." House Comm. on the District of Columbia, Home Rule for the District of Columbia 1973-1974, Background and Legislative History of H. R. 9056, H. R. 9682, and Related Bills, 93d Cong., 2d Sess. 1126 (1974). These specific statements in the legislative history relating to the

express statutory language in question were all considered by the court below. Petitioner's App. at 3a-4a. That court's thorough work requires no further review here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

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RICHARD A. BISHOP, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY

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REPLY

Petitioners seek this Court's review of the decision of the Court of Appeals because of the importance of the questions it raises with regard to the nature and extent of Congress's delegation to the people of the District of Columbia of its power to legislate for the District granted by article I, section 8, clause 17 of the United States Constitution and because of the severe impact of the deci-

sion on the fiscal stability of the District. Respondents do not dispute the grave fiscal consequences ensuing from the decision of the Court of Appeals to invalidate the District's franchise tax on unincorporated professional and personal services businesses operating in the District. However, they deny that the decision severely restricts the congressional grant of self-government to the people of the District under the District of Columbia Self-Government and Governmental Reorganization Act (the "Self-Government Act") by arguing that Congress "expressly and deliberately" withheld from the District the power to impose such a tax. (See Bishop Br. 7; Kleiboemer Br. 9). Ignoring the stated intent of Congress in that Act to grant the District as broad legislative authority as constitutionally permissible, *id.* §§ 102(a), 302, D.C. Code §§1-121(a), 1-124 (Supp. V, 1978), and established rules of statutory construction, respondents, like the Court of Appeals, rely exclusively upon a narrow restriction on the District's legislative power, contained in § 602(a)(5) of the Act, D.C. Code, § 1-147(a)(5) (Supp. V, 1978). This provision, however, by its plain terms simply precludes the District from imposing a tax on the *personal* income of nonresident *individuals,* but not from imposing a *franchise* tax on unincorporated *business entities* the owners of which reside outside the District. The only support that respondents or the Court of Appeals offer for their conclusion that Congress intended to deny the citizens of the District this basic taxing authority consists of a few isolated statements by members of Congress. A brief examination of these statements, however, reveals that respondents and the Court of Appeals have distorted their significance and that they cannot overcome the plain meaning of the Self-Government Act. Cf. *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). Accordingly, this Court should not permit these misleading statements to obscure the gravity of the deprivation of self-government that the

decision of the Court of Appeals entails or to minimize the significance of the questions presented by this petition.

The legislative history upon which respondent Kleiboemer relies is not that of the Self-Government Act or any home rule bill, but rather of the District of Columbia Professional Corporation Act, Pub. L. 92-180, 85 Stat. 576 (1971). He cites a committee report pertaining to that Act for the proposition that Congress refused to extend the franchise tax in its District of Columbia Income and Franchise Tax of 1947 to professionals "because such removal would impose a 'commuter' tax on 'one group of taxpayers.'" (Kleiboemer Br. 9). However, the quoted language was not, as respondents would have this Court believe, a statement by the committee, but was offered merely as a summary of the second of two arguments advanced by "[r]epresentatives of the Bar Association." See H.R. Rep. No. 92-508, 92d Cong., 1st Sess. 4 (1971). The committee itself did not characterize the franchise tax as a "commuter tax." This statement is not in the slightest manner indicative of the intent of the 93d Congress in enacting the Self-Government Act.

Respondent Bishop, likewise, relies on statements taken out of context as indicative of Congress's intent in enacting § 602(a)(5). He asserts that "Senator Eagleton himself described this provision as a 'specific prohibition as to the imposition of a commuter tax, a reciprocal income tax, *or any other tax* on nonresidents of the District of Columbia.'" (Emphasis by respondent.) (Bishop Br. 11) However, contrary to respondents assertion, Senator Eagleton was not referring to a provision of the Self-Government Act or any home rule act, but rather an entirely distinct sort of measure, the District of Columbia Revenue Act of 1971, H.R. 11341, 92d Cong., 1st Sess. (1971). See 117 Cong. Rec. 42498 (1971).[1] The Court of

[1] The provision of the District of Columbia Revenue Act of 1971 discussed by Senator Eagleton, § 809(b), was omitted from the final enactment. *See* Pub. L. 92-196, 85 Stat. 651 (1971).

Appeals similarly referred to this remark erroneously as one made "[d]uring the Senate hearings on the Home Rule Act" (App. 3a), hearings which took place two years later. The difference between a provision in a revenue act and a home rule act is significant. The Revenue Act of 1971 discussed by Senator Eagleton did not purport to grant the District Government legislative authority over "all rightful subjects of legislation." D.C. Code, § 1-124 (Supp. V, 1978).

Moreover, the debate in the Senate over the District of Columbia Revenue Act of 1971 was clearly not concerned with the possibility of a franchise tax on nonresident businesses, but rather of the prospect of a tax on the personal income of individual nonresidents. The provision in question was described as "a specific exception prohibiting the Council from levying a personal income tax on nonresidents." 117 Cong. Rec. 42498. There was no mention whatever of franchise taxes or other business taxes. From the context it is clear that Senator Eagleton was speaking of "nonresidents" in the sense of natural persons, not business entities. As we noted in our certiorari petition (*id.* at 13 & n. 6), the "reciprocal income" and "commuter tax" proposals of the District Government in the 91st and 92d Congress were across-the-board taxes aimed at salaried employees, not at businesses. Thus, Senator Eagleton's comments, placed in proper context, provide absolutely no support for the conclusion that § 602(a)(5) of the Self-Government Act prohibited the imposition of franchise taxes on businesses.

Any doubt as to Senator Eagleton's views in this regard can be resolved by examining his statements on the floor of the Senate, five weeks earlier, with respect to the home rule bill he sponsored in that Congress, S. 2652, 92d Cong., 1st Sess. (1971). In discussing a provision of that

bill identical to § 602(a)(5) of the Self-Government Act, he made it clear that this limitation on the broad power of a home rule District Government was not intended to preclude the District from imposing a franchise tax on nonresidents:

> For example—of utmost importance—the present mayor-commissioner and city council have jurisdiction over taxes—to wit, the real property tax. They can raise it or lower it. As to all other taxes, *including franchise taxes,* sales taxes, local income taxes, that jurisdiction is in Congress. *We transfer the jurisdiction of taxation* to the elected city council and to the elected mayor—*holding back,* as I said before, the *commuter tax.* (Emphasis added.)

117 Cong. Rec. 35747 (1971). Viewed in the light of this contemporanous statement, Senator Eagleton's remark with regard to the District of Columbia Revenue Act of 1971, in a context devoid of any reference concerning franchise taxes, surely can not overcome the plain meaning of the Self-Government Act or justify the serious deprivation of governmental rights ensuing from the Court of Appeal's decision.

The final shred of legislative history relied upon by respondents is a remark by Representative Gude during a committee's markup of an early House version of the home rule bill, H.R. 9056, 93d Cong., 1st Sess. (1973). Respondent Bishop asserts that "Representative Gude, the House sponsor of the prohibition, confirmed that it would preclude 'any tax which is based on a percentage of income regardless of whether it is technically considered personal income.' " (Bishop Br. 11). This remark, like the others, is taken out of context, and fails to withstand

close scrutiny. The remark was part of the following exchange between Representatives Breckinridge and Gude:

> Mr. Breckinridge. I have a question.
>
> Mr. Diggs. I yield to the gentleman from Kentucky.
>
> Mr. Breckinridge. I am concerned about the phrase, "personal income tax." I take it what we are driving at here is precluding any tax which is based on a percentage of income regardless of whether it is technically considered personal income.
>
> Let me illustrate [.] [A]n occupational tax is not an income tax technically, under certain jurisdictions, I do not know about this jurisdiction.
>
> Mr. Gude. The thrust of this amendment, the interpretation would be that that would be included under this amendment.
>
> . . .

Staff of the House District of Columbia Committee, Home Rule for the District of Columbia 1973-1974, Background and Legislative History, 93d Cong., 2d Sess. 1126 (1974). Thus, Mr. Breckinridge's principal concern was whether the term "personal income tax" embraced "occupational taxes." This is hardly evidence, however, of a congressional intent to preclude the District from imposing a tax on the earnings of businesses. The focus of the discussion was clearly upon the prospect of the imposition of a tax on individuals. Mr. Breckinridge's concern is put in proper perspective by reference to the occupational tax imposed by the jurisdiction in which he practiced law, Lexington, Kentucky. That city imposes an "Occupational License (Income) Tax" on "both residents and nonresi-

dents of the City of Lexington at the rate of one and one-half per cent (1-½%) of all *salaries, wages, commissions and other compensation earned* for work done or services performed or rendered in the City." Lexington-Fayette Urban County Ordinance 2822, Kentucky CCH Tax Reporter ¶¶ 72-010, 72-020. (Emphasis added.) Thus, these remarks, taken as a whole and with reference to the taxing jurisdiction in which Mr. Breckinridge practiced, show that the focus of his concern was whether the provision would prohibit the imposition by the District of the same type of tax imposed on the *salaries and wages* of nonresidents by the City of Lexington. There is no indication that his remarks were directed at the type of franchise tax imposed on unincorporated businesses in the District; indeed, with respect to the taxing scheme of the District, he admitted, "I do not know about this jurisdiction." Thus, this exchange between Representatives Breckinridge and Gude during a committee meeting provides no evidence of a congressional intent to preclude the District from imposing a franchise tax on business entities.

In conclusion, nothing can minimize the seriousness of the deprivation of self-government to the people of the District ensuing from the decision of the Court of Appeals. Congress, in enacting the Self-Government Act, plainly granted the District statelike taxing power, withholding only the authority to impose taxes on the personal income of individual nonresidents. It did not preclude the District from imposing a franchise tax on business entities operating within the District. The statements of members of Congress upon which respondents and the Court of Appeals rely are taken out of context and, upon careful examination, do not support their position. In any case, such meager legislative history certainly cannot overcome the plain meaning of the Self-Government Act. The serious deprivation of self-government resulting from such a rewriting

of the Self-Government Act and the detrimental impact on the fiscal integrity of the District, which is undisputed, surely present a question of importance sufficient to warrant this Court's review.

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